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The Necessity of an Energetic and Active National Government

No. 23

by Alexander Hamilton

To the People of the State of New York:

The necessity of a Constitution, at least equally energetic with the one proposed, to the preservation of the Union, is the point at the examination of which we are now arrived.

This inquiry will naturally divide itself into three branches - the objects to be provided for by the federal government, the quantity of power necessary to the accomplishment of those objects, the persons upon whom that power ought to operate. Its distribution and organization will more properly claim our attention under the succeeding head.

The principal purposes to be answered by union are these - the common defence of the members; the preservation of the public peace, as well against internal convulsions as external attacks; the regulation of commerce with other nations and between the States; the superintendence of our intercourse, political and commercial, with foreign countries.

NOTE: Original 18th century spellings are retained in this manuscript.

The authorities essential to the common defence are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide

for their support. These powers ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be co-extensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defence.

This is one of those truths which to a correct and unprejudiced mind, carries its own evidence along with it; and may be obscured, but cannot be made plainer by argument or reasoning. It rests upon axioms as simple as they are universal; the means ought to be proportioned to the end; the persons, from whose agency the attainment of any end is expected, ought to possess the means by which it is to be attained.

Whether there ought to be a federal government intrusted with the care of the common defence, is a question in the first instance, open for discussion; but the moment it is decided in the affirmative, it will follow, that that government ought to be clothed with all the powers requisite to complete execution of its trust. And unless it can be shown that the circumstances which may affect the public safety are reducible within certain determinate limits; unless the contrary of this position can be fairly and rationally disputed, it must be admitted, as a necessary consequence, that there can be no limitation of that authority which is to provide for the defence and protection of community, in any matter essential to its efficacy - that is, in any matter essential to the formation, direction, or support of the National Forces.

Defective as the present Confederation has been proved to be, this principle appears to have been fully recognized by the framers of it; though they have not made proper or adequate provision for its exercise. Congress have an unlimited discretion to make requisitions of men and money; to govern the army and navy; to direct their operations. As their requisitions are made constitutionally binding upon the State, who are in fact under the most solemn obligations to furnish the supplies required of them, the intention evidently was, that the United States should command whatever resources were by them judged requisite to the "common defence and general welfare." It was presumed that a sense of their true interests, and a regard to the dictates of good faith, would be

found sufficient pledges for the punctual performance of the duty of the members to the federal head.

The experiment has, however, demonstrated that this expectation was ill-founded and illusory; and the observations, made under the last head, will, I imagine, have sufficed to convince the impartial and discerning, that there is no absolute necessity for an entire change in the first principles of the system; that if we are in earnest about giving the Union energy and duration, we must abandon the vain project of legislating upon the States in their collective capacities; we must extend the laws of the federal government to the individual citizens of America; we must discard the fallacious scheme of quotas and requisitions, as equally impracticable and unjust. The result from all this is that the Union ought to be invested with full power to levy troops; to build and equip fleets; and to raise the revenues which will be required for the formation and support of an army and navy, in the customary and ordinary modes practised in other governments.

If the circumstances of our country are such as to demand a compound instead of a simple, a confederate instead of a sole, government, the essential point which will remain to be adjusted will be to discriminate the objects as far as it can be done, which shall appertain to the different provinces or departments of power; allowing to each the most ample authority for fulfilling the objects committed to its charge. Shall the Union be constituted the guardian of the common safety? Are fleets and armies and revenues necessary to this purpose? The government of the Union must be empowered to pass all laws, and to make all regulations which have relation to them. The same must be the case in respect to commerce, and to every other matter to which its jurisdiction is permitted to extend. Is the administration of justice between the citizens of the same State the proper department of the local governments? These must possess all the authorities which are connected with this object, and with every other that may be allotted to their particular cognizance and direction. Not to confer in each case a degree of power commensurate to the end, would be to violate the most obvious rules of prudence and propriety, and improvidently to trust the great interests of the nation to hands which are disabled from managing them with vigor and success.

Who so likely to make suitable provisions for the public defence, as that body to which the guardianship of the public safety is confided; which, as the centre of information, will best understand the extent and urgency of the dangers that threaten; as

the representative of the whole, will feel itself most deeply interested in the preservation of every part; which, from the responsibility implied in the duty assigned to it, will be most sensibly impressed with the necessity of proper exertions; and which, by the extension of its authority throughout the States, can alone establish uniformity and concert in the plans and measures by which the common safety is to be secured? Is there not a manifest inconsistency in devolving upon the federal government the care of the general defence, and leaving in the State governments the effective powers by which it is to be provided for? Is not a want of co-operation the infallible consequence of such a system? And will not weakness, disorder, and undue distribution of the burdens and calamities of war, an unnecessary and intolerable increase of expense, be its natural and inevitable concomitants? Have we not had unequivocal experience of its effects in the course of the revolution which we have just accomplished?

Every view we may take of the subject, as candid inquirers after truth, will serve to convince us, that is it both unwise and dangerous to deny the federal government an unconfined authority, as to all those objects which are intrusted to its management. It will indeed deserve the most vigilant and careful attention of the people, to see that it be modelled in such a manner as to admit of its being safely vested with the requisite powers. If any plan which has been, or may be, offered to our consideration, should not, upon a dispassionate inspection, be found to answer this description, it ought to be rejected. A government, the constitution of which renders it unfit to be trusted with all of the powers which a free people ought to delegate to any government, would be an unsafe and improper depository of the National Interests. Wherever these can with propriety be confided, the coincident powers may safely accompany them. This is the true result of all just reasoning upon the subject. And the adversaries of the plan promulgated by the convention ought to have confined themselves to showing, that the internal structure of the proposed government was such as to render it unworthy of the confidence of the people. They ought not to have wandered into inflammatory declamations and unmeaning cavils about the extent of the powers. The Powers are not too extensive for the Objects of federal administration, or, in other words, for the management of our National Interests; nor can any satisfactory argument be framed to show that they are chargeable with such an excess. If it be true, as has been insinuated by some of

the writers on the other side, that the difficulty arises from the nature of the thing, and that the extent of the country will not permit us to form a government in which such ample powers can safely be reposed, it would prove that we ought to contract our views, and resort to the expedient of separate confederacies, which will move within more practicable spheres. For the absurdity must continually stare us in the face of confiding to a government the direction of the most essential national interests, without daring to trust it to the authorities which are indispensable to their proper and efficient management. Let us not attempt to reconcile contradictions, but firmly embrace a rational alternative.

I trust, however, that the impracticability of one general system cannot be shown. I am greatly mistaken, if any thing of weight has yet been advanced of this tendency; and I flatter myself, that the observations which have been made in the course of these papers have served to place the reverse of that position in as clear a light as any matter still in the womb of time and experience can be susceptible of. This, at all events, must be evident, that the very difficulty itself, drawn from the extent of the country, is the strongest argument in favor of an energetic government; for any other can certainly never preserve the Union of so large an empire. If we embrace the tenets of those who oppose the adoption of the proposed Constitution, as the standard of our political creed, we cannot fail to verify the gloomy doctrines which predict the impracticability of a national system pervading entire limits of the present Confederacy.

Publius (Alexander Hamilton)

No. 24

Hamilton

To Provide for the Common Defense

To the People of the State of New York:

To the powers proposed to be conferred upon the federal government, in respect to the creation and direction of the national forces, I have met with but one specific objection, which, if I understand it right, is this, - That proper provision has not been made against the existence of standing armies in time of peace; an objection which, I shall now endeavor to show, rests on weak and unsubstantial foundations.

It has indeed been brought forward in the most vague and general form, supported only by bold assertions, without the appearance of argument; without even the sanction of theoretical opinions; in contradiction to the practice of other free nations and to the general sense of America, as expressed in most of the existing constitutions. The propriety of this remark will appear, the moment it is recollected that the objection under consideration turns upon a supposed necessity of restraining the Legislative authority of the nation, in the article of military establishments; a principle unheard of, except in one or two of our State constitutions, and rejected in all the rest.

A stranger to our politics, who was to read our newspapers at the present juncture, without having previously inspected the plan reported by the convention, would be naturally led to one of two conclusions: either that it contained a positive injunction, that standing armies should be kept up in time of peace; or that it vested in the executive the whole power of levying troops without subjecting his discretion, in any shape, to the control of the legislature.

If he came afterwards to peruse the plan itself, he would be surprised to discover, that neither the one nor the other was the case; that the whole power of raising armies was lodged in the Legislature, not in the Executive; that this legislature was to be a popular body, consisting of the representatives of the people periodically elected; and that instead of the provision he had supposed in favor of standing armies, there was to be found, in respect to this object, an important qualification even of the

legislative discretion, in that clause which forbids the appropriation of money for the support of an army for any longer period than two years - a precaution which, upon a nearer view of it, will appear to be a great and real security against the keeping up of troops without evident necessity.

Disappointed in this first surmise, the person I have supposed would be apt to pursue his conjectures a little further. He would naturally say to himself, it is impossible that all this vehement and pathetic declamation can be without some colorable pretext. It must needs be that this people, so jealous of their liberties, have, in all the preceding models of the constitutions which they have established, inserted the most precise and rigid precautions on this point, the omission of which, in the new plan, has given birth to all this apprehension and clamor.[sic]

If, under this impression, he proceeded to pass in review the several State constitutions, how great would be his disappointment to find that two only of them contained an interdiction of standing armies in time of peace; that the other eleven had either observed a profound silence on the subject, or had in express terms admitted the right of the Legislature to authorize their existence.

Still, however, he would be persuaded that there must be some plausible foundation for the cry raised on this head. He would never be able to imagine, while any source of information remained unexplored, that it was nothing more than an experiment upon the public credulity, dictated either by a deliberate intention to deceive, or by the overflowings of a zeal too intemperate to be ingenuous. It would probably occur to him, that he would be likely to find the precautions he was in search of in the primitive compact between the States. Here, at length, he would expect to meet with a solution of the enigma. No doubt, he would observe to himself, the existing Confederation must contain the most explicit provisions against military establishments in time of peace; and a departure from this model, in a favorite point, has occasioned the discontent which appears to influence these political champions.;

If he should now apply himself to a careful and critical survey of the articles of Confederation, his astonishment would not only be increased, but would acquire a mixture of indignation, at the unexpected discovery, that these article, instead of containing the prohibition he looked for, and though they had, with jealous circumspection, restricted the authority of the State legislatures in this particular, had not imposed a single restraint on that of the United States. If he happened to be a man of quick sensibility, or

ardent temper, he could now no longer refrain from regarding these clamors as the dishonest artifices of a sinister and unprincipled opposition to a plan which ought at least to receive a fair and candid examination from all sincere lovers of their country! How else, he would say, could the authors of them have been tempted to vent such loud censures upon that plan, about a point in which it seems to have conformed itself to the general sense of America as declared in its different forms of government, and in which it has even super-added a new and powerful guard unknown to any of them? If, on the contrary, he happened to be a man calm and dispassionate feelings, he would indulge a sigh for the frailty of human nature, and would lament, that in a matter so interesting to the happiness of millions, the true merits of the question should be perplexed and entangled by expedients so unfriendly to an impartial and right determination. Even such a man could hardly forbear remarking, that a conduct of this kind has too much the appearance of an intention to mislead the people by alarming their passions, rather than to convince them by arguments addressed to their understandings.

But however little this objection may be countenanced, even by precedents among ourselves, it may be satisfactory to take a nearer view of its intrinsic merits. From a close examination it will appear that restraints upon the discretion of the legislature in respect to military establishments in time of peace, would be improper to be imposed, and if imposed, from the necessities of society, would be unlikely to be observed.

Though a wide ocean separates the United States from Europe, yet there are various considerations that warn us against an excess of confidence or security. On one side of us, and stretching far into our rear, are growing settlements subject to the dominion of Britain. On the other side, and extending to meet the British settlements, are colonies and establishments subject to the dominion of Spain. This situation and the vicinity of the West India Islands, belonging to these two powers, create between them, in respect to their American possessions and in relation to us, a common interest. The savage tribes on our Western frontier ought to be regarded as our natural enemies, their natural allies, because they have most to fear from us, and most to hope from them. The improvements in the art of navigation have, as to the facility of communication, rendered distant nations, in a great measure, neighbors. Britain and Spain are among the principal maritime powers of Europe. A future concert of views between these nations

ought not to be regarded as improbable. The increasing remoteness of consanguinity is every day diminishing the force of the family compact between France and Spain. And politicians have ever with great reason considered the ties of blood as feeble and precarious links of political connection. These circumstances combined, admonish us not to be too sanguine in considering ourselves as entirely out of the reach of danger.

Previous to the Revolution, and ever since the peace, there has been a constant necessity for keeping small garrisons on our Western frontier. No person can doubt that these will continue to be indispensable, if it should only be against the ravages and depredations of the Indians. These garrisons must either be furnished by occasional detachments from the militia, or by permanent corps in the pay of the government. The first is impracticable; and if practicable, would be pernicious. The militia would not long, if at all, submit to be dragged from their occupations and families to perform that most disagreeable duty in times of profound peace. And if they could be prevailed upon or compelled to do it, the increased expense of a frequent rotation of service, and the loss of labor and disconcertion of the industrious pursuits of individuals, would form conclusive objections to the scheme. It would be as burdensome and injurious to the public as ruinous to private citizens. The latter resource of permanent corps in the pay of the government amounts to a standing army in time of peace; a small one, indeed, but not the less real for being small. Here is a simple view of the subject, that shows us at once the impropriety of a constitutional interdiction of such establishments, and the necessity of leaving the matter to the discretion and prudence of the legislature.

In proportion to our increase in strength, it is probable, nay, it may be said certain, that Britain and Spain would augment their military establishments in our neighborhood. If we should not be willing to be exposed, in a naked and defenceless condition, to their insults and encroachments, we should find it expedient to increase our frontier garrisons in some ratio to the force by which our Western settlements might be annoyed. There are, and will be, particular posts, the possession of which will include the command of large districts of territory, and facilitate future invasions of the remainder. It may be added that some of those posts will be keys to the trade with the Indian nations. Can any man think it would be wise to leave such posts in a situation to be at any instant seized by one or the other of two neighboring and formidable powers? To act

this part would be to desert all the usual maxims of prudence and policy.

If we mean to be a commercial people, or even to be secure on our Atlantic side, we must endeavor, as soon as possible, to have a navy. To this purpose there must be dock-yards, and sometimes of the fleet itself.

Publius (Alexander Hamilton)

NO. 25

HAMILTON

The States and the Common Defense

To the People of the State of New York:

It may perhaps be urged that the objects enumerated in the preceding number ought to be provided for the State governments, under the direction of the Union. But this would be, in reality, an inversion of the primary principle of our political association, as it would in practice transfer the care of the common defence from the federal head to the individual members: a project oppressive to some States, dangerous to all, and baneful to the Confederacy.

The territories of Britain, Spain, and of the Indian nations in our neighborhood do not border on particular States, but encircle the Union from Maine to Georgia. The danger, though in different degrees, is therefore common. And the means of guarding against it ought, in like manner, to be the objects of common councils and of a common treasury. It happens that some States, from local situation, are more directly exposed. New York is of this class. Upon the plan of separate provisions, New York would have to sustain the whole weight of the establishments requisite to her immediate safety, and to the mediate or ultimate protection of her neighbors. This would neither be equitable as it respected New York nor safe as it respected the other States. Various inconveniences would attend such a system. The States, to whose lot it might fall to support the necessary establishments, would be as little able as willing, for a considerable time to come, to bear the burden of competent provisions. The security of all would thus be subjected to the parsimony, improvidence, or inability of a part. If the resources of such part becoming more abundant and extensive,

its provisions should be proportionally enlarged, the other States would quickly take the alarm at seeing the whole military force of the Union in the hands of two or three of its members, and those probably amongst the most powerful. They would each choose to have some counterpoise, and pretences could easily be contrived. In this situation, military establishments, nourished by mutual jealousy, would be apt to swell beyond their natural or proper size; and being at the separate disposal of the members, they would be engines for the abridgment or demolition of the national authority.

Reasons have been already given to induce a supposition that the State governments will too naturally be prone to a rivalry with that of the Union, the foundation of which will be the love of power; and that in any contest between the federal head and one of its members the people will be most apt to unite with their local government. If, in addition to this immense advantage, the ambition of the members should be stimulated by the separate and independent possession of military forces, it would afford too strong a temptation and too great a facility to them to make enterprises upon, and finally to subvert, the constitutional authority of the Union. On the other hand, the liberty of the people would be less safe in this state of things than in that which left the national forces in the hands of the national government. As far as an army may be considered as dangerous weapon of power, it had better be in those hands of which the people are most likely to be jealous than in those of which they are least likely to be jealous. For it is a truth, which the experience of ages had attested, that the people are always most in danger when the means of injuring their rights are in the possession or those of whom they entertain the least suspicion.

The framers of the existing Confederation, fully aware of the danger to the Union from the separate possession of military forces by the States, have, in express terms, prohibited them from having either ships or troops, unless with the consent of congress. The truth is, that the existence of a federal government and military establishments under State authority are not less at variance with each other than a due supply of the federal treasury and the system of quotas and requisitions.

There are other lights besides those already taken notice of, in which the impropriety of restraints on the discretion of the national legislature will be equally manifest. The design of the objection, which has been mentioned, is to preclude standing armies in time of peace, though we have never been informed how

far it is designed the prohibition should extend: whether to raising armies as well as to keeping them up in a season of tranquillity or not. If it be confined to the latter it will have no precise signification, and it will be ineffectual for the purpose intended. When armies are once raised what shall be denominated "keeping them up," contrary to the sense of the Constitution? What time shall be requisite to ascertain the violation? Shall it be a week, a month, a year? Or shall we say they may be continued as long as the danger which occasioned their being raised continues? This would be to admit that they might be kept up in time of peace, against threatening or impending danger, which would be at once to deviate from the literal meaning of the prohibition, and to introduce an extensive latitude of construction. Who shall judge of the continuance of the danger? This must undoubtedly be submitted to the national government, and the matter would then be brought to this issue, that the national government, to provide against apprehended danger, might in the first instance raise troops, and might afterwards keep them on foot as long as they supposed the peace or safety of the community was in any degree of jeopardy. It is easy to perceive that a discretion so latitudinary as this would afford ample room for eluding the force of the provision.

The supposed utility of a provision of this kind can only be founded on the supposed probability, or at least possibility, of a combination between the executive and legislative, in some scheme of usurpation. Should this at any time happen, how easy would it be to fabricate pretences of approaching danger! Indian hostilities, instigated by Spain or Britain, would always be at hand. Provocations to produce the desired appearances might even be given to some foreign power, and appeased again by timely concessions. If we can reasonably presume such a combination to have been formed, and that the enterprise is warranted by sufficient prospect of success, the army, when once raised, from whatever cause, or on whatever pretext, may be applied to the execution of the project.

If, to obviate this consequence, it should be resolved to extend the prohibition to the raising of armies in time of peace, the United States would then exhibit the most extraordinary spectacle which the world has yet seen, - that of a nation incapacitated by its Constitution to prepare for defence, before it was actually invaded. As the ceremony of a formal denunciation of war has of late fallen into disuse, the presence of an enemy within our territories must be

waited for, as the legal warrant to the government to begin its levies of men for the protection of the State. We must receive the blow, before we could even prepare to return it. All that kind of policy by which nations anticipate distant danger, and meet the gathering storm, must be abstained from as contrary to the genuine maxims of a free government. We must expose our property and liberty to the mercy of foreign invaders, and invite them by our weakness to seize the naked and defenceless prey, because we are afraid that rulers, created by our choice, dependent on our will, might endanger that liberty, by an abuse of the means necessary to its preservation.

Here I expect we shall be told that the militia of the country is its natural bulwark, and would be at all times equal to the national defence. This doctrine, in substance, had like to have lost us our independence. It cost millions to the United States that might have been saved. the facts which, from our own experience, forbid a reliance of this kind, are too recent to permit us to be the dupes of such a suggestion. The steady operations of war against a regular and disciplined army can only be successfully conducted by a force of the same kind. Considerations of economy, not less that of stability and vigor, confirm this position. The American militia, in the course of the late war, have, by their valor on numerous occasions, erected eternal monuments to their fame; but the bravest of them feel and know that the liberty of their country could not have been established by their efforts alone, however great and valuable they were. War, like most other things, is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice.

All violent policy, as it is contrary to the natural and experienced course of human affairs, defeats itself. Pennsylvania, at this instant, affords an example of th truth of this remark. The Bill of Rights of the State declares that standing armies are dangerous to liberty, and ought not to be kept up in time of peace. Pennsylvania, nevertheless, in a time of profound peace, from the existence of partial disorders in one or two of her counties, has resolved to raise a body of troops; and in all probability will keep them up as long as there is any appearance of danger to the public peace. The conduct of Massachusetts affords a lesson on the same subject, though on different ground. That State (without waiting for the sanction of Congress, as the articles of the Confederation require) was compelled to raise troops to quell a domestic insurrection, and still keeps a corps in pay to prevent a revival of

the spirit of revolt. The particular constitution of Massachusetts opposed no obstacle to the measure; but the instance is still of use to instruct us that cases are likely to occur under our government, as well as under those of other nations, which will sometimes render a military force in time of peace essential to the security of the society, and that it is therefore improper in this respect to control the legislative discretion. It also teaches us, in its application to the United States, how little the rights of a feeble government are likely to be respected, even by its own constituents. And it teaches us, in addition to the rest, how unequal parchment provisions are to a struggle with public necessity.

It was fundamental maxim of the Lacedaemonian commonwealth, that the post of admiral should not be conferred twice on the same person. The peloponnesian confederates, having suffered a severe defeat at sea from the Athenians, demanded Lysander, who had before served with success in that capacity, to command the combined fleets. The lacedaemonians, to gratify their allies, and yet preserve the semblance of an adherence to their ancient institutions, had recourse to the flimsy subterfuge of investing Lysander with the real power of admiral, under the nominal title of vice-admiral. This instance is selected from among a multitude that might be cited to confirm the truth already advanced and illustrated by domestic examples; with is, that nations pay little regard to rules and maxims calculated in their very nature to run counter to the necessities of society. Wise politicians will be cautious about fettering the government with restrictions that cannot be observed, because they know that every branch of the fundamental laws, though dictated by necessity, impairs that sacred reverence which ought to be maintained in the breast of rulers towards the constitution of a country, and forms a precedent for other breaches where the same plea of necessity does not exist at all, or is less urgent and palpable.

Publius (Alexander Hamilton)

No. 26

HAMILTON

The Powers of Congress and the Common Defense

To the People of the State of New York:

It was thing hardly to be expected that in a popular revolution the minds of men should stop at the happy mean which marks the salutary boundary between Power and Privilege, and combines the energy of government with the security of private rights. A failure in this delicate and important point is the great source of the inconveniences we experience, and if we are not cautious to avoid a repetition of the error, in our future attempts to rectify and ameliorate our system, we may travel from one chimerical project to another; we may try change after change; but we shall never be likely to make any material change for the better.

The idea of restraining the legislative authority, in the means of providing for the national defence, is one of those refinements which owe their origin to a zeal for liberty more ardent than enlightened. We have seen, however, that it has not had thus far an extensive prevalency; that even in this country, where it made its first appearance, Pennsylvania and North Carolina are the only two States by which it has been in any degree patronized; and that all the others have refused to give it the lease countenance; wisely judging that confidence must be placed somewhere; that the necessity of doing it, is implied in the very act of delegating power; and that it is better to hazard the abuse of that confidence than to embarrass the government and endanger the public safety by impolitic restrictions on the legislative authority. The opponents of the proposed Constitution combat, in the respect, the general decision of America; and instead of being taught by experience the propriety of correcting any extremes into which we may have heretofore run, they appear disposed to conduct us into still more dangerous, and more extravagant. As if the tone of government had been found too high, or too rigid, the doctrines they teach are calculated to induce us to depress or to relax it, by expedients which, upon other occasions, have been condemned or forborne. It may be affirmed without the imputation of invective, that if the principles they inculcate, on various points, could so far obtain as to become the popular creed, they would utterly unfit the people of this country for any species of government whatever. But a danger of this kind is not to be apprehended. The citizens of America have too much discernment to be argued into anarchy. And I am much mistaken, if experience has not wrought a deep and solemn conviction in the public mind, that greater energy of government is essential to the welfare and prosperity of the community.

It may not be amiss in this place concisely to remark the origin and progress of the idea, which aims at the exclusion of military establishments in time of peace. Though in speculative minds it may arise from a contemplation of the nature and tendency of such institutions, fortified by the events that have happened in other ages and countries, yet as a national sentiment, it must be traced to those habits of thinking which we derive from the nation from whom the inhabitants of these States have in general sprung.

In England, for a long time after the Norman Conquest, the authority of the monarch was almost unlimited. Inroads were gradually made upon the prerogative, in favor of liberty, first by the barons, and afterwards by the people, till the greatest part of its most formidable pretensions became extinct. But it was not till the revolution in 1688, which elevated the Prince of Orange to the throne of Great Britain, that English liberty was completely triumphant. As incident to the undefined power of making war, an acknowledged prerogative of the crown, Charles II. had, by his own authority, kept on foot in time of peace a body of 5,000 regular troops. And this number James II. increased to 30,000; who were paid out of his civil list. At the revolution, to abolish the exercise of so dangerous an authority, it became an article of the Bill of Rights then framed, that "the raising or keeping a standing army within the kingdom in time of peace, unless with the consent of parliament, was against law."

In that kingdom, when the pulse of liberty was at its highest pitch, no security against the danger of standing armies was thought requisite, beyond a prohibition of their being raised or kept up by the mere authority of the executive magistrate. The patriots, who effected that memorable revolution, were too temperate, too well-informed to think of any restraint on the legislative discretion. They were aware that a certain number of troops for guards and garrisons were indispensable; that no precise bounds could be set to the national exigencies; that a power equal to every possible contingency must exist somewhere in the government: and that when they referred the exercise of the power to the judgment of the legislature, they had arrived at the ultimate point of precaution which was reconcilable with the safety of the community.

From the same source, the people of America may be said to have derived an hereditary impression of danger to liberty, from standing armies in time of peace. The circumstances of a revolution quickened the public sensibility on every point connected with the security of popular rights, and in some

instances raised the warmth of our zeal beyond the degree which consisted with the due temperature of the body politic. The attempts of two of the States to restrict the authority of the legislature in the article of military establishments, are of the number of these instances. The principles which had taught us to be jealous of the power of an hereditary monarch were by an injudicious excess extended to the representatives of the people in their popular assemblies. Even in some of the States, where this error was not adopted, we find unnecessary declaration that standing armies ought not to be kept up, in time of peace, without the consent of the legislature. I call them unnecessary, because the reason which had introduced a similar provision into the English Bill of Rights is not applicable to any of the State constitutions. The power of raising armies at all, under those constitutions, can by no construction be deemed to reside anywhere else, than in the legislatures themselves; and it was superfluous, if not absurd, to declare that a matter should not be done without the consent of a body, which alone had the power of doing it accordingly, in some of those constitutions, and among others, in that of this State of New York, which has been justly celebrated, both in Europe and America, as one of the best of the forms of government established in this country, there is a total silence upon the subject.

It is remarkable, that even in the two States which seem to have meditated an interdiction of military establishments in time of peace, the mode of expression made use of is rather cautionary than prohibitory. It is not said, that standing armies shall not be kept up, but that they ought not to be kept up, in time of peace. This ambiguity of terms appears to have been the result of a conflict between jealousy and conviction; between the desire of excluding such establishments at all events, and the persuasion that an absolute exclusion would be unwise and unsafe.

Can it be doubted that such a provision, whenever the situation of public affairs was understood to require a departure from it, would be interpreted by the legislature into a mere admonition, and would be made to yield to the necessities or supposed necessities of the State? Let the fact already mentioned, with respect to Pennsylvania, decide. What then (it may be asked) is the use of such a provision, if it cease to operate the moment there is an inclination to disregard it?

Let us examine whether there by any comparison, in point of efficacy, between the provision alluded to and that which is contained in the new Constitution, for restraining the

appropriations of money for military purposes to the period of two years. The former, by aiming at too much, is calculated to effect nothing; the latter, by steering clear of an imprudent extreme, and by being perfectly compatible with a proper provision for the exigencies of the nation, will have a salutary and powerful operation.

The legislature of the United States will be obliged, by this provision, once at least in every two years, to deliberate upon the propriety of keeping a military force on foot; to come to a new resolution on the point; and to declare their sense of the matter, by a formal vote in the face of their constituents. They are not at liberty to vest in the executive department permanent funds for the support of an army, if they were even incautious enough to be willing to repose in it so improper a confidence. As the spirit of party, in different degrees, must be expected to infect all political bodies, there will be, no doubt, persons in the national legislature willing enough to arraign the measures and criminate the views of the majority. The provision for the support of a military force will always be a favorable topic for declamation. As often as the question comes forward, the public attention will be roused and attracted to the subject, by the party in opposition; and if the majority should be really disposed to exceed the proper limits, the community will be warned of the danger, and will have an opportunity of taking measures to guard against it. Independent of parties in the national legislature itself, as often as the period of discussion arrived, the State legislatures, who will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government, will constantly have their attention awake to the conduct of the national rulers, and will be ready enough, if any thing improper appears, to sound the alarm to the people, and not only to be the voice, but, if necessary, the arm of their discontent.

Schemes to subvert the liberties of a great community require time to mature them for execution. An army, so large as seriously to menace those liberties, could only be formed by progressive augmentations; which would suppose, not merely a temporary combination between the legislature and executive, but a continued conspiracy for a series of time. Is it probable that such a combination would exist at all? Is it probable that it would be persevered in, and transmitted along through all the successive variations in a representative body, which biennial elections would naturally produce in both houses? Is it presumable, that every man,

the instant he took his seat in the national Senate of House of Representatives, would commence a traitor to his constituents and to his country? Can it be supposed that there would not be found one man, discerning enough to detect so atrocious a conspiracy, or bold or honest enough to apprise his constituents of their danger? If such presumptions can fairly be made, there ought at once to be an end of all delegated authority. The people should resolve to recall all the powers they have heretofore parted with out of their own hands, and to divide themselves into as many States as there are counties, in order that they may be able to manage their own concerns in person.

If such suppositions could even be reasonably made, still the concealment of the design, for any duration, would be impracticable. It would be announced, by the very circumstance of augmenting the army to so great an extent in time of profound peace. What colorable reason could be assigned, in a country so situated, for such vast augmentations of the military force? It is impossible that the people could be long deceived: and the destruction of the project, and of the projectors, would quickly follow the discovery.

It has been said that the provision which limits the appropriation of money for the support of an army to the period of two years would be unavailing, because the Executive, when once possessed of a force large enough to awe the people into submission, would find resources in that very force sufficient to enable him to dispense with supplies from the acts of the legislature. But the question again recurs, upon what pretence would he be put in possession of a force of that magnitude in time of peace? If we suppose it to have been created in consequence of some domestic insurrection or foreign war, then it becomes a case not within the principles of the objection; for this is levelled against the power of keeping up troops in time of peace. Few persons will be so visionary as seriously to contend that military forces ought not to be raised to quell a rebellion or resist an invasion; and if the defence of the community under such circumstances should make it necessary to have an army so numerous as to hazard its liberty, this is one of those calamities for which there is neither preventative nor cure. It cannot be provided against by any possible form of government; it might even result from a simple league offensive and defensive, if it should ever be necessary for the confederates or allies to form an army for common defence.

But it is an evil infinitely less likely to attend us in a united than in a disunited state; nay, it may be safely asserted that it is an evil altogether unlikely to attend us in the latter situation. It is not easy to conceive a possibility that dangers so formidable can assail the whole Union, as to demand a force considerable enough to place our liberties in the least jeopardy, especially if we take into our view the aid to be derived from the militia, which ought always to be counted upon as a valuable and powerful auxiliary. But in a state of disunion (as has been fully shown in another place), the contrary of this supposition would become not only probable, but almost unavoidable.

Publius (Alexander Hamilton)

No. 27

HAMILTON

The Enforcement of the Supreme Law of the Land

To the People of the State of New York:

It has been urged, in different shapes, that a Constitution of the kind proposed by the convention cannot operate without the aid of a military force to execute its laws. This, however, like most other things that have been alleged on that side, rests on mere general assertion, unsupported by any precise or intelligible designation of the reasons upon which it is founded. As far as I have been able to divine the latent meaning of the objectors, it seems to originate in a presupposition that the people will be disinclined to the exercise of federal authority in any matter of an internal nature. Waiving any exception that might be taken to the inaccuracy or inexplicitness of the distinction between the internal and external, let us inquire what ground there is to presuppose that disinclination in the people. Unless we presume at the same time that the powers of the general government will be worse administered than those of the State government, there seems to be no room for the presumption of ill-will, disaffection, or opposition in the people. I believe it may be laid down as a general rule that their confidence in and obedience to a government will commonly be proportioned to the goodness or badness of its administration. It must be admitted that there are exceptions to this rule; but these exceptions depend so entirely on accidental causes, that they cannot be considered as having any relation to the intrinsic merits or demerits of a constitution. These can only be judged of by general principles and maxims.

Various reasons have been suggested, in the course of these papers, to induce a probability that the general government will be better administered than the particular governments: the principal of which reasons are that the extension of the spheres of election will present a greater option, or latitude of choice, to the people; that through the medium of the State legislatures - which are select bodies of men, and which are to appoint the members of the national Senate - there is reason to expect that this branch will generally be composed with peculiar care and judgment; that these

circumstances promise greater knowledge and more extensive information in the national councils, and that they will be less apt to be tainted by the spirit of faction, and more out of the reach of those occasional ill-humors, or temporary prejudices and propensities, which, in smaller societies, frequently contaminate the public councils, beget injustice and oppression of a part of the community, and engender schemes which, though they gratify a momentary inclination or desire, terminate in general distress dissatisfaction, and disgust. Several additional reasons of considerable force, to fortify that probability, will occur when we come to survey, with a more critical eye, the interior structure of the edifice which we are invited to erect. It will be sufficient here to remark, that until satisfactory reasons can be assigned to justify an opinion, that the federal government is likely to be administered in such a manner as to render it odious or contemptible to the people, there can be no reasonable foundation for the supposition that the laws of the Union will meet with any greater obstruction from them, or will stand in need of any other methods to enforce their execution, than the laws of the particular members.

The hope of impunity is a strong incitement to sedition; the dread of punishment, a proportionably strong discouragement to it. Will not the government of the Union, which, if possessed of a due degree of power, can call to its aid the collective resources of the whole Confederacy, be more likely to repress the former sentiment and to inspire the latter, than that of a single State, which can only command the resources within itself? A turbulent faction in a State may easily suppose itself able to contend with the friends to the government in that State: but it can hardly be so infatuated as to imagine itself a match for the combined efforts of the Union. If this reflection be just, there is less danger of resistance from irregular combinations of individuals to the authority of the Confederacy, than to that of a single member.

I will, in this place, hazard an observation, which will not be the less just because to some it may appear new; which is, that the more the operations of the national authority are intermingled in the ordinary exercise of government, the more the citizens are accustomed to meet with it in the common occurrences of their political life, the more it is familiarized to their sight and to their feelings, the further it enters into those objects which touch the most sensible chords and put in motion the most active springs of the human heart, the greater will be the probability that it will conciliate the respect and attachment of the community. Man is

very much a creature of habit. A thing that rarely strikes his senses will generally have but little influence upon his mind. A government continually at a distance and out of sight can hardly be expected to interest the sensations of the people. The inference is, that the authority of the Union, and the affections of the citizens towards it, will be strengthened, rather than weakened by its extension to what are called matters of internal concern; and will have less occasion to recur to force, in proportion to the familiarity and comprehensiveness of its agency. The more it circulates through those channels and currents in which the passions of mankind naturally flow, the less will it require the aid of the violent and perilous expedients of compulsion.

One thing, at all events, must be evident, that a government like the one proposed would bid much fairer to avoid the necessity of using force, than that species of league contended for by most of its opponents; the authority of which should only operate upon the States in their political or collective capacities. It has been shown that in such a Confederacy there can be no sanction for the laws but force; that frequent delinquencies in the members are the natural offspring of the very frame of the government; and that as often as these happen, they can only be redressed, if at all, by war and violence.

The plan reported by the convention, by extending the authority of the federal head to the individual citizens of the several States, will enable the government to employ the ordinary magistracy of each, in the execution of its laws. It is easy to perceive that this will tend to destroy, in the common apprehension, all distinction between the sources from which they might proceed; and will give the federal government the same advantage for securing a due obedience to its authority which is enjoyed by the government of each State, in addition to the influence on public opinion which will result from the important consideration of its having power to call to its assistance and support the resources of the whole Union. It merits particular attention in this place, that the laws of the Confederacy, as to the enumerated and legitimate objects of its jurisdiction, will become the supreme law of the land; to the observance of which all officers, legislative executive, and judicial, in each State, will be bound by the sanctity of an oath. Thus the legislatures, courts, and magistrates, of the respective members, will be incorporated into the operations of the national government as far as its just and constitutional authority extends; and will be rendered auxiliary to

the enforcement of its laws. Any man who will perceive that there is good ground to calculate upon a regular and peaceable execution of the laws of the Union, if its powers are administered with a common share of prudence. If we will arbitrarily suppose the contrary, we may deduce any inferences we please from the supposition; for it is certainly possible, by an injudicious exercise of the authorities of the best government that ever was, or ever can be instituted, to provoke and precipitate the people into the wildest excesses. But though the adversaries of the proposed Constitution should presume that the national rulers would be insensible to the motives of public good, or to the obligations of duty, I would still ask them how the interests of ambition, or the views of encroachment, can be promoted by such a conduct?

Publius (Alexander Hamilton)

No. 28

HAMILTON

A National Army and Internal Security

To the People of the State of New York:

That there may happen cases in which the national government may be necessitated to resort to force, cannot be denied. Our own experience has corroborated the lessons taught by the examples of other nations; that emergencies of this sort will sometimes arise in all societies, however constituted; that seditions and insurrections are, unhappily, maladies as inseparable from the body politic as tumors and eruptions from the natural body; that the idea of governing at all times by the simple force of law (which we have been told is the only admissible principle of republican government:, has no place but in the reveries of those political doctors whose sagacity disdains the admonitions of experimental instruction.

Should such emergencies at any time happen under the national government, there could be no remedy but force. The means to be employed must be proportioned to the extent of the mischief. If it should be a slight commotion in a small part of a State, the militia of the residue would be adequate to its suppression; and the natural presumption is that they would be ready to do their duty. An insurrection, whatever may be its immediate cause, eventually endangers all government. Regard to the public peace, if not to the rights of the Union, would engage the citizens to whom the contagion had not communicated itself to oppose the insurgents; and if the general government should be found in practice conducive to the prosperity and felicity of the people, it were irrational to believe that they would be disinclined to its support.

If, on the contrary, the insurrection should pervade a whole State, or a principal part of it, the employment of a different kind of force might become unavoidable. It appears that Massachusetts found it necessary to raise troops for repressing the disorders within the State; that Pennsylvania, from the mere apprehension of commotions among a part of her citizens, had thought proper to have recourse to the same measure. Suppose the State of New York

had been inclined to re-establish her lost jurisdiction over the inhabitants of Vermont, could she have hoped for success in such an enterprise from the efforts of the militia alone? Would she not have been compelled to raise and to maintain a more regular force for the execution of her design? If it must then be admitted that the necessity of recurring to a force different from the militia, in cases of this extraordinary nature³, is applicable to the State governments themselves, why should the possibility, that the national government might be under a like necessity, in similar extremities, be made an objection to its existence? is it not surprising that men who declare an attachment to the Union in the abstract, should urge as an objection to the proposed Constitution what applies with tenfold weight to the plan for which they contend; and what, as far as it has any foundation in truth, is an inevitable consequence of civil society upon an enlarged scale? Who would not prefer that possibility to the unceasing agitations and frequent revolutions which are the continual scourges of petty republics;

Let us presume this examination in another light. Suppose, in lieu of one general system, two, or three, or even four Confederacies were to be formed, would not the same difficulty oppose itself to the operations of either of these Confederacies? Would not each of them be exposed to the same casualties; and when these happened, be obliged to have recourse to the same expedients for upholding its authority which are objected to in a government for all the States? Would the militia, in this supposition, be more ready or more able to support the federal authority than in the case of a general union? All candid and intelligent men must, upon due consideration, acknowledge that the principle of the objection is equally applicable to either of the two cases; and that whether we have one government for all the States, or different governments for different parcels of them, or even if there should be an entire separation of the States, there might sometimes be a necessity to make use of a force constituted differently from the militia, to preserve the peace of the community and to maintain the just authority of the laws against those violent invasions of them which amount to insurrections and rebellions.

Independent of all other reasonings upon the subject, it is a full answer to those who require a more peremptory provision against military establishments in time of peace, to say that the whole powers of the proposed government is to be in the hands of the representatives of the people. This is the essential, and, after

all, only efficacious security for the rights and privileges of the people, which is attainable in civil society.

If the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defence which is paramount to all positive forms of government, and which against the usurpations of the national rulers, may be exerted with infinitely better prospect of success than against those of the rulers of an individual state. In a single state, if the persons intrusted with supreme power become usurpers, the different parcels, subdivisions, or districts of which it consists, having no distinct government in each, can take no regular measures for defence. The citizens must rush tumultuously to arms, without concert, without system, without resource, except in their courage and despair. The usurpers, clothed with the forms of legal authority, can too often crush the opposition in embryo. The smaller the extent of the territory, the more difficult will it be for the people to form a regular or systematic plan of opposition, and the more easy will it be to defeat their early efforts. Intelligence can be more speedily obtained of their preparations and movements, and the military force in the possession of the usurpers can be more rapidly directed against the part where the opposition has begun. In this situation there must be a peculiar coincidence of circumstances to insure success to the popular resistance.

The obstacles to usurpation and the facilities of resistance increase with the increased extent of the state, provided the citizens understand their rights and are disposed to defend them. The natural strength of the people in a large community, in proportion to the artificial strength of the government, is greater than in a small, and of course more competent to a struggle with the attempts of the government to establish a tyranny. But in a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress. How wise will it be in them by cherishing the union to preserve to themselves an advantage which can never be too highly prized!

It may safely be received as an axiom in our political

system, that the State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority. Projects of usurpation cannot be masked under pretences so likely to escape the penetration of select bodies of men, as of the people at large. The legislatures will have better means of information. They can discover the danger at a distance; and possessing all the organs of civil power, and the confidence of the people, they can at once adopt a regular plan of opposition, in which they can combine all the resources of the community. They can readily communicate with each other in the different States, and unite their common forces for the protection of their common liberty.

The great extent of the country is a further security. We have already experienced its utility against the attacks of a foreign power. And it would have precisely the same effect against the enterprises of ambitious rulers in the national councils. If the federal army should be able to quell the resistance of one State, the distant States would have it in their power to make head with fresh forces. The advantages obtained in one place must be abandoned to subdue the opposition in others; and the moment the part which had been reduced to submission was left to itself, its efforts would be renewed, and its resistance revive.

We should recollect that the extent of the military force must, at all events, be regulated by the resources of the country. For a long time to come, it will not be possible to maintain a large army; and as the means of doing this increase, the population and natural strength of the community will proportionably increase. When will the time arrive that the federal government can raise and maintain an army capable of erecting a despotism over the great body of the people of an immense empire, who are in a situation, through the medium of their State governments, to take measures for their own defence, with all the celerity, regularity, and system of independent nations? The apprehension may be considered as a disease, for which there can be found no cure in the resources of argument and reasoning.

Publius (Alexander Hamilton)

No. 29

HAMILTON

The Regulation of the Militia

To the People of the State of New York:

The power of regulating the militia, and of commanding its services in times of insurrection and invasion are natural incidents to the duties of superintending the common defence, and of watching over the internal peace of the Confederacy.

It requires no skill in the science of war to discern that uniformity in the organization and discipline of the militia would be attended with the most beneficial effects, whenever they were called into service for the public defence. It would enable them to discharge the duties of the camp and of the field with mutual intelligence and concert - an advantage of peculiar moment in the operations of an army; and it would fit them much sooner to acquire the degree of proficiency in military functions which would be essential to their usefulness. This desirable uniformity can only be accomplished by confiding the regulation of the militia to the direction of the national authority. It is therefore, with the most evident propriety, that the plan of the convention proposes to empower the Union "to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."

Of the different grounds which have been taken in opposition to the plan of the convention, there is none that was so little to have been expected, or is so untenable in itself, as the one from which this particular provision has been attacked. If a well-regulated militia be the most natural defence of a free country, it ought certainly to be under the regulation and at the disposal of that body which is constituted the guardian of the national security. If standing armies are dangerous to liberty, an efficacious power over the militia, in the body to whose care the protection of the State is committed, ought, as far as possible, to take away the inducement and the pretext to such unfriendly institutions. If the federal

government can command the aid of the militia in those emergencies which call for the military arm in support of the civil magistrate, it can the better dispense with the employment of a different kind of force. If it cannot avail itself of the former, it will be obliged to recur to the latter. To render an army unnecessary, will be a more certain method of preventing its existence than a thousand prohibitions upon paper.

In order to cast an odium upon the power of calling forth the militia to execute the laws of the Union, it has been remarked that there is nowhere any provision in the proposed Constitution for calling out the posse comitatus, to assist the magistrate in the execution of his duty; whence it has been inferred, that military force was intended to be his only auxiliary. There is a striking incoherence in the objections which have appeared, and sometimes even from the same quarter, not much calculated to inspire a very favorable opinion of the sincerity or fair dealing of their authors. The same persons who tell us in one breath, that the powers of the federal government will be despotic and unlimited, inform us in the next, that it has not authority sufficient even to call out the posse comitatus. The latter, fortunately, is as much short of the truth as the former exceeds it. It would be as absurd to doubt, that a right to pass all laws necessary and proper to execute its declared powers would include that of requiring the assistance of the citizens to the officers who may be intrusted with the execution of those laws, as it would be to believe, that a right to enact laws necessary and proper for the imposition and collection of taxes would involve that of varying the rules of descent and of the alienation of landed property, or of abolishing the trial by jury in cases relating to it. It being therefore evident that the supposition of a want of power to require the aid of the posse comitatus is entirely destitute of color, it will follow, that the conclusion which has been drawn from it, in its application to the authority of the federal government over the militia, is as uncandid as it is illogical. What reason could there be to infer, that force was intended to be the sole instrument of authority, merely because there is a power to make use of it when necessary? What shall we think of the motives which could induce men of sense to reason in this manner? How shall we prevent a conflict between charity and judgment?

By a curious refinement upon the spirit of republican jealousy, we are even taught to apprehend danger from the militia itself, in the hands of the federal government. It is observed that select corps may be formed, composed of the young and ardent,

who may be rendered subservient to the views of arbitrary power. What plan for the regulation of the militia may be pursued by the national government, is impossible to be foreseen. But so far from viewing the matter in the same light with those who object to select corps as dangerous, were the Constitution ratified, and were I to deliver my sentiments to a member of the federal legislature from this State on the subject of a militia establishment, I should hold to him, in substance, the following discourse:

"The project of disciplining all the militia of the United States is as futile as it would be injurious, if it were capable of being carried into execution. A tolerable expertness in military movements is a business that requires time and practice. It is not a day, or even a week, that will suffice for the attainment of it. To oblige the great body of the yeomanry, and of the other classes of citizens, to be under arms for the purpose of going through military exercises and evolutions, as often as might be necessary to acquire the degree of perfection which would entitle them to the character of a well-regulated militia, would be a real grievance to the people, and a serious public inconvenience and loss. It would form an annual deduction from the productive labor of the country, to an amount which, calculating upon the present numbers of the people, would not fall far short of the whole expense of the civil establishments of all the States. To attempt a thing which would abridge the mass of labor and industry to so considerable an extent, would be unwise: and the experiment, if made, could not succeed, because it would not long be endured. Little more can reasonably be aimed at, with respect to the people at large, than to have them properly armed and equipped; and in order to see that this be not neglected, it will be necessary to assemble them once or twice in the course of a year.

"But though the scheme of disciplining the whole nation must be abandoned as mischievous or impracticable; yet it is a matter of the utmost importance that a well-digested plan should, as soon as possible, be adopted for the proper establishment of the militia. The attention of the government ought particularly to be directed to the formation of a select corps of moderate extent, upon such principles as will really fit them for service in case of need. By thus circumscribing the plan, it will be possible to have an excellent body of well-trained militia, ready to take the field whenever the defence of the State shall require it. This will not only lessen the call for military establishments, but if circumstances should at any time oblige the government to form an

army of any magnitude that army can never be formidable to the liberties of the people while there is a large body of citizens, little, if at all, inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow-citizens. This appears to me the only substitute that can be devised for standing army, and the best possible security against it, if it should exist."

Thus differently from the adversaries of the proposed Constitution should I reason on the same subject, deducing arguments of safety from the very sources which they represent as fraught with danger and perdition. But how the national legislature may reason on the point, is a thing which neither they nor I can foresee.

There is something so far-fetched and so extravagant in the idea of danger to liberty from the militia, that one is at a loss whether to treat it with gravity or with raillery; whether to consider it as a mere trial of skill, like the paradoxes of rhetoricians; as a disingenuous artifice to instill prejudices at any price; or as the serious offspring of political fanaticism. Where, in the name of common-sense, are our fears to end if we may not trust our sons, our brothers, our neighbors, our fello-citizens? What shadow of danger can there be from men who are daily mingling with the rest of their countrymen, and who participate with them in the same feelings, sentiments, habits, and interests? What reasonable cause of apprehension can be inferred from a power in the Union to prescribe regulations for the militia, and to command its services when necessary, while the particular States are to have the sole and exclusive appointment of the officers? If it were possible seriously to indulge a jealousy of the militia upon any conceivable establishment under the federal government, the circumstance of the officers being in the appointment of the States ought at once to extinguish it. There can be no doubt that this circumstance will always secure to them a preponderating influence over the militia.

In reading many of the publications against the Constitution, a man is apt to imagine that he is perusing some ill-written tale or romance, which, instead of natural and agreeable images, exhibits to the mind nothing but frightful and distorted shapes--

"Gorgons, hydras, and chimeras dire";
discoloring and disfiguring whatever it represents, and transforming every thing it touches into a monster.

A sample of this is to be observed in the exaggerated and

improbable suggestions which have taken place respecting the power of calling for the services of the militia. That of New Hampshire is to be marched to Georgia, of Georgia to New Hampshire, of New York to Kentucky, and of Kentucky to Lake Champlain. Nay, the debts due to the French and Dutch are to be paid in militiamen instead of louis d'or and ducats. At one moment there is to be a large army to lay prostrate the liberties of the people; at another moment the militia of Virginia are to be dragged from their home five or six hundreds miles, to tame the republican contumacy of Massachusetts; and that of Massachusetts is to be transported an equal distance to subdue the refractory haughtiness of the aristocratic Virginians. Do the persons who rave at this rate imagine that their art or their eloquence can impose any conceits or absurdities upon the people of America for infallible truths?

If there should be an army to be made use of as the engine of despotism, what need of the militia? If there should be no army, whither would the militia, irritated by being called upon to undertake a distant and hopeless expedition, for the purpose of riveting the chains of slavery upon a part of their countrymen, direct their course, but to the seat of the tyrants, who had meditated so foolish as well as so wicked a project, to crush them in their imagined intrenchments of power, and to make them an example of the just vengeance of an abused and incensed people? Is this the way in which usurpers stride to dominion over a numerous and enlightened nation? Do they begin by exciting the detestation of the very instruments of their intended usurpations? Do they usually commence their career by wanton and disgustful acts of power, calculated to answer no end, but to draw upon themselves universal hatred and execration? Are suppositions of this sort the sober admonitions of discerning patriots to a discerning people? Or are they the inflammatory ravings of incendiaries or distempered enthusiasts? If we were even to suppose the national rulers actuated by the most ungovernable ambition, it is impossible to believe that they would employ such preposterous means to accomplish their designs.

In times of insurrection, or invasion, it would be natural and proper that the militia of a neighboring State should be marched into another, to resist a common enemy, or to guard the republic against the violence of faction or sedition. This was frequently the case, in respect to the first object, in the course of the late war; and this mutual succor is, indeed, a principal end of our political association. if the power of affording it be placed

under the direction of the Union, there will be no danger of a supine and listless inattention to the dangers of a neighbor, till its near approach had superadded the incitements of self-preservation to the too feeble impulses of duty and sympathy.

Publius (Alexander Hamilton)

No. 41

MADISON

**Powers Delegated to the General
Government: I**

To the People of the State of New York:

The Constitution proposed by the convention may be considered under two general points of view. The First relates to the sum or quantity of power which it vests in the government, including the restraints imposed on the States. The Second, to the particular structure of the government, and the distribution of this power among its several branches.

Under the first view of the subject, two important questions arise: 1. Whether any part of the powers transferred to the general government be unnecessary or improper? 2. Whether the entire mass of them be dangerous to the portion of jurisdiction left in the several States?

Is the aggregate power of the general government greater than ought to have been vested in it? This is the first question.

It cannot have escaped those who have attended with candor to the arguments employed against the extensive powers of the government, that the authors of them have very little considered how far these powers were necessary means of attaining a necessary end. They have chosen rather to dwell on the inconveniences which must be unavoidably blended with all political advantages; and on the possible abuses which must be incident to every power or trust, of which a beneficial use can be made. This method of handling the subject cannot impose on the good sense of the people of America. It may display the subtlety of the writer; it may open a boundless field for rhetoric and declamation; it may inflame the passions of the unthinking, and may confirm the prejudices of the misthinking: but cool and candid people will at once reflect, that the purest of human blessings must have a portion of alloy in them; that the choice must always be made, if not of the lesser evil, at least of the greater, not the perfect, good; and that in every political institution, a power to advance the public happiness involves a discretion which may be misapplied and abused. They will see, therefore, that in all cases where power

is to be conferred, the point first to be decided is, whether such a power be necessary to the public good; as the next will be, in case of an affirmative decision, to guard as effectually as possible against a perversion of the power to the public detriment.

That we may form a correct judgment on this subject, it will be proper to review the several powers conferred on the government of the Union; and that this may be the more conveniently done they may be reduced into different classes as they relate to the following deferent objects: 1. Security against foreign danger; 2. Regulation of the intercourse with foreign nations; 3. Maintenance of harmony and proper intercourse among the States; 4. Certain miscellaneous objects of general utility; 5. Restraint of the States from certain injurious acts; 6. Provisions for giving due efficacy to all these powers.

The powers falling within the first class are those of declaring war and granting letters of marque; of providing armies and fleets; of regulating and calling forth the militia; of levying and borrowing money.

Security against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union. The powers requisite for attaining it must be effectually confided to the federal councils.

Is the power of declaring war necessary? No man will answer this question in the negative. It would be superfluous, therefore, to enter into a proof of the affirmative. The existing Confederation establishes this power in the most ample form.

Is the power of raising armies and equipping fleets necessary? This is involved in the foregoing power. It is involved in the power of self-defence.

But was it necessary to give an indefinite power of raising troops, as well as providing fleets; and of maintaining both in peace, as well as in war?

The answer to these questions has been too far anticipated in another place to admit an extensive discussion of them in this place. The answer indeed seems to be so obvious and conclusive as scarcely to justify such a discussion in any place. With what color of propriety could the force necessary for defence be limited by those who cannot limit the force of offence? If a federal Constitution could chain the ambition or set bounds to the exertions of all other nations, then indeed might it prudently chain the discretion of its own government, and set bounds to the exertions for its own safety.

How could a readiness for war in time of peace be safely prohibited, unless we could prohibit, in like manner, the preparations and establishments of every hostile nation? The means of security can only be regulated by the means and the danger of attack. They will, in fact, be ever be ever determined by these rules, and by no others. It is in vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions. If one nation maintains constantly a disciplined army, ready for the service of ambition or revenge, it obliges the most pacific nations who may be within the reach of its enterprisetotakecorresponding precautions. The fifteenth century was the unhappy epoch of military establishments in the time of peace. They were introduced by Charles VII. of France. All Europe has followed, or been forced into, the example. Had the example not been followed by other nations, all Europe must long ago have worn the chains of a universal monarch. Were every nation excerpt France now to disband its peace establishments, the same event might follow. The veteran legions of Rome were an overmatch for the undisciplined valor of all other nations, and rendered her the mistress of the world.

Not the less true is it, that the liberties of Rome proved the final victim to her military triumphs; and that the liberties of Europe, as far as they ever existed, have, with few exceptions, been the price of her military establishments. A standing force, therefore, is a dangerous, at the same time that it may be a necessary, provision. On the smallest scale it has its inconveniences. On an extensive scale its consequences may be fatal. On any scale it is an object of laudable circumspection and precaution. A wise nation will combine all these considerations; and whilst it does not rashly preclude itself from any resource which may become essential to its safety, will exert all its prudence in diminishing both the necessity and the danger of resorting to one which may be inauspicious to its liberties.

The clearest marks of this prudence are stamped on the proposed Constitution. The Union itself, which it cements and secures, destroys every pretext for a military establishment which could be dangerous. America united, with a handful of troops or without a single soldier, exhibits a more forbidding posture to foreign ambition than America disunited, with a hundred thousand veterans ready for combat. It was remarked, on a former occasion,

that the want of this pretext had saved the liberties of one nation in Europe. Being rendered by her insular situation and her maritime resources impregnable to the armies of her neighbors, the rulers of Great Britain have never been able, by real or artificial danger, to cheat the public into an extensive peace establishment. The distance of the United States from the powerful nations of the world gives them the same happy security. A dangerous establishment can never be necessary or plausible, so long as they continue a united people. But let it never, for a moment, be forgotten that they are indebted for this advantage to the Union alone. The moment of its dissolution will be the date of a new order of things. The fears of the weaker, or the ambition of the stronger States, or Confederacies, will set the same example in the New, as Charles VII. did in the Old World. The example will be followed here from the same motives which produced universal imitation there. Instead of deriving from our situation the precious advantage which Great Britain has derived from hers, the face of America will be but a copy of that of the continent of Europe. It will present liberty everywhere crushed between standing armies and perpetual taxes. The fortunes of disunited America will be even more disastrous than those of Europe. The sources of evil in the latter are confined to her own limit. No superior powers of another quarter of the globe intrigue among her rival nations, inflame their mutual animosities, and render them the instruments of foreign ambition, jealousy, and revenge. In America the miseries springing from her internal jealousies, contentions, and wars, would form a part only of her lot. A plentiful addition of evils would have their source in that relation in which Europe stands to this quarter of the earth, and which no other quarter of the earth bears to Europe.

This picture of the consequences of disunion cannot be too highly colored, or too often exhibited. Every man who loves liberty, ought to have it ever before his eyes, that he may cherish in his heart a due attachment to the Union of America, and be able to set a due value on the means of preserving it.

Next to the effectual establishment of the Union, the best possible precaution against danger from standing armies is a limitation of the term for which revenue may be appropriated to their support. This precaution the Constitution has prudently added. I will not repeat here the observations which I flatter myself have placed this subject in a just and satisfactory light. But it may not be improper to take notice of an argument against this part of

the Constitution, which has been drawn from the policy and practice of Great Britain. It is said that the continuance of an army in that kingdom requires an annual vote of the legislature; whereas the American Constitution has lengthened this critical period to two years. This is the form in which the comparison is usually stated to the public; but is it a just form? Is it a fair comparison? Does the British Constitution restrain the parliamentary discretion to one year? Does the American impose on the Congress appropriations for two years? On the contrary, it cannot be unknown to the authors of the fallacy themselves, that the British Constitution fixes no limit whatever to the discretion of the legislature, and that the American ties down the legislature to two years, as the longest admissible term.

Had the argument from the British example been truly stated, it would have stood thus: The term for which supplies may be appropriated to the army establishment, though unlimited by the British Constitution, has nevertheless, in practice, been limited by parliamentary discretion to a single year. Now, if in Great Britain, where the House of Commons is elected for seven years; where so great a proportion of the members are elected by so small a proportion of the members are elected by so small a proportion of the people; where the electors are so corrupted by the representatives, and the representatives so corrupted by the Crown, the representative body can possess a power to make appropriations to the army for an indefinite term, without desiring, or without daring, to extend the term beyond a single year, ought not suspicion herself to blush, in pretending that the representatives of the United States, elected freely by the whole body of the people, every second year, cannot be safely intrusted with the discretion over such appropriations, expressly limited to the short period of two years?

A bad cause seldom fails to betray itself. Of this truth, the management of the opposition to the federal government is an unvaried exemplification. But among all the blunders which have been committed, none is more striking than the attempt to enlist on that side the prudent jealousy entertained by the people, of standing armies. The attempt has awakened fully the public attention to that important subject: and has led to investigations which must terminate in a thorough and universal conviction, not only that the Constitution has provided the most effectual guards against danger from that quarter, but that nothing short of a Constitution fully adequate to the national defence and the preservation of the Union,

can save America from as many standing armies as it may be split into States and Confederacies, and from such a progressive augmentation, of these establishments in each, as will render them as burdensome to the properties and ominous to the liberties of the people, as any establishment that can become necessary, under a united and efficient government, must be tolerable to the former and safe to the latter.

The palpable necessity of the power to provide and maintain a navy has protected that part of the Constitution against a spirit of censure, which has spared few other parts. It must, indeed, be numbered among the greatest blessings of America, that as her union will be the only source of her maritime strength, so this will be a principal source of her security against danger from abroad. In this respect our situation bears another likeness to the insular advantage of Great Britain. The batteries most capable of repelling foreign enterprises on our safety, are happily such as can never be turned by a perfidious government against our liberties.

The inhabitants of the Atlantic frontier are all of them deeply interested in this provision for naval protection, and if they have hitherto been suffered to sleep quietly in their beds; if their property has remained safe against the predatory spirit of licentious adventurers; if their maritime towns have not yet been compelled to ransom themselves from the terror of a conflagration, by yielding to the exactions of daring and sudden invaders, these instances of good fortune are not to be ascribed to the capacity of the existing government for the protection of those from whom it claims allegiance, but to causes that are fugitive and fallacious. If we except perhaps Virginia and Maryland, which are peculiarly vulnerable on their eastern frontiers, no part of the Union ought to feel more anxiety on this subject than New York. Her sea-coast is extensive. A very important district of the State is an island. The State itself is penetrated by a large navigable river for more than fifty leagues. The great emporium of its commerce, the great reservoir of its wealth, lies every moment at the mercy of events, and may almost be regarded as a hostage for ignominious compliances with the dictates of a foreign enemy, or even with the rapacious demands of pirates and barbarians. Should a war be the result of the precarious situation of European affairs, and all the unruly passions attending it be let loose on the ocean, our escaped from insults and depredations, not only on that element, but every part of the other bordering on it, will be truly miraculous. In the present condition of America, the States more immediately

exposed to these calamities have nothing to hope from the phantom of a general government which now exists; and if their single resources were equal to the task of fortifying themselves against the danger, the object to be protected would be almost consumed by the means of protecting them.

The power of regulating and calling forth the militia has been already sufficiently vindicated and explained.

The power of levying and borrowing money, being the sinew of that which is to be exerted in the national defence, is properly thrown into the same class with it. This power, also, has been examined already with much attention, and has, I trust, been clearly shown to be necessary, both in the extent and form given to it by the Constitution. I will address one additional reflection only to those who contend that the power ought to have been restrained to external taxation - by which they mean, taxes on articles imported from other countries. It cannot be doubted that this will always be a valuable source of revenue; that for a considerable time it must be a principal source; that at this moment it is an essential one. But we may form very mistaken ideas on this subject, if we do not call to mind in our calculations, that the extent of revenue drawn for foreign commerce must vary with the variations, both in the extent and the kind of imports; and that these variations do not correspond with the progress of population, which must be the general measure of the public wants. As long as agriculture continues the sole field of labor, the importation of manufactures must increase as the consumers multiply. As soon as domestic manufactures are begun by the hands not called for by agriculture, the imported manufactures will decrease as the numbers of people increase. In a more remote stage, the imports may consist in a considerable part of raw materials, which will be wrought into articles for exportation, and will, therefore, require rather the encouragement of bounties, than to be loaded with discouraging duties. A system of government, meant for duration, ought to contemplate these revolutions, and be able to accommodate itself to them.

Some, who have not denied the necessity of the power of taxation, have grounded a very fierce attack against the Constitution, on the language in which it is defined. It has been urged and echoed, that the power "to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence and general welfare of the United States," amounts to an unlimited commission to exercise every power which may be

alleged to be necessary for the common defence or general welfare. No stronger proof could be given of the distress under which these writers labor for objections, than their stooping to such a misconstruction.

Had no other enumeration or definition of the powers of the Congress been found in the Constitution, than the general expressions just cited, the authors of the objection might have had some color for it; though it would have been difficult to find a reason for so awkward a form of describing an authority to legislate in all possible cases. A power to destroy the freedom of the press, the trial by jury, or even to regulate the course of descents, or the forms of conveyances, must be very singularly expressed by the terms "to raise money for the general welfare."

But what color can the objection have, when a specification of the objects alluded to by these general terms immediately follows, and is not even separated by a longer pause than a semicolon? If the different parts of the same instrument ought to be so expounded, as to give meaning to every part which will bear it, shall one part of the same sentence be excluded altogether from a share in the meaning; and shall the more doubtful and indefinite terms be retained in their full extent, and the clear and precise expressions be denied any signification whatsoever? For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power? Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars. But the idea of an enumeration of particulars which neither explain nor qualify the general meaning, and can have no other effect than to confound and mislead, is an absurdity, which, as we are reduced to the dilemma of charging either on the authors of the objection or on the authors of the Constitution, we must take the liberty of supposing, had not its origin with the latter.

The objection here is the more extraordinary, as it appears that the language used by the convention is a copy from the articles of Confederation. The objects of the Union among the States, as described in article third, are "their common defence, security of their liberties, and mutual and general welfare." The terms of article eighth are still more identical: "All charges of war and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress, shall be defrayed out of a common treasury," etc. A similar language again occurs in article ninth. Construe either of these

articles by the rules which would justify the construction put on the new Constitution, and they vest in the existing Congress a power to legislate in all cases whatsoever. But what would have been thought of that assembly, if, attaching themselves to these general expressions, and disregarding the specifications which ascertain and limit their import, they had exercised an unlimited power of providing for the common defence and general welfare? I appeal to the objectors themselves, whether they would in that case have employed the same reasoning in justification of Congress as they now make use of against the convention. How difficult it is for error to escape its own condemnation!

Publius (James Madison)

No. 46

MADISON

State and Federal Powers Compared

To the People of the State of New York

Resuming the subject of the last paper, I proceed to inquire whether the federal government or the State governments will have the advantage with regard to the predilection and support of the people. Notwithstanding the different modes in which they are appointed, we must consider both of them as substantially dependent on the great body of the citizens of the United States. I assume this position here as it respects the first, reserving the proofs for another place. The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes. The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments, not only as mutual rivals and enemies, but as uncontrolled by any common superior in their efforts to usurp the authorities of each other. These gentlemen must here be reminded of their error. They must be told that the ultimate authority, wherever the derivative may be found, resides in the people alone, and that it will not depend merely on the comparative ambition or address of the different governments, whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other. Truth, no less than decency, requires that the event in every case should be supposed to depend on the sentiments and sanction of their common constituents.

Many considerations, besides those suggested on a former occasion, seem to place it beyond doubt that the first and most natural attachment of the people will be to the governments of their respective States. Into the administration of these a greater number of individuals will expect to rise. From the gift of these a greater number of offices and emoluments will flow. By the superintending care of these, all the more domestic and personal interests of the people will be regulated and provided for. With the affairs of these, the people will be more familiarly and minutely conversant. And with the members of these, will a greater

proportion of the people have the ties of personal acquaintance and friendship, and of family and party attachments; on the side of these, therefore, the popular bias may well be expected most strongly to incline.

Experience speaks the same language in this case. The federal administration, though hitherto very defective in comparison with what may be hoped under a better system, had, during the war, and particularly whilst the independent fund of paper emissions was in credit, an activity and importance as great as it can well have in any future circumstances whatever. It was engaged, too, in a course of measures which had for their object the protection of every thing that was dear, and the acquisition of every thing that could be desirable to the people at large. It was, nevertheless, invariably found, after the transient enthusiasm for the early Congresses was over, that the attention and attachment of the people were turned anew to their own particular governments; that the federal council was at no time to idol of popular favor; and that opposition to proposed enlargements of its powers and importance was the side usually taken by the men who wished to build their political consequence on the prepossessions of their fello-citizens.

If, therefore, as has been elsewhere remarked, the people should in future become more partial to the federal than to the State governments, the change can only result from such manifest and irresistible proofs of a better administration, as will overcome all their antecedent propensities. And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due; but even in that case the State governments could have little to apprehend, because it is only within a certain sphere that the federal power can, in the nature of things, be advantageously administered.

The remaining points on which I propose to compare the federal and State governments, are the disposition and the faculty they may respectively possess, to resist and frustrate the measures of each other.

It has been already proved that the members of the federal will be more dependent on the members of the State governments, than the latter will be on the former. It has appeared also, that the prepossessions of the people, on whom both will depend, will be more on the side of the State governments, than of the federal government. So far as the disposition of each towards the other may be influenced by these causes, the State governments must

clearly have the advantage. But in a distinct and very important point of view, the advantage will lie on the same side. The prepossessions, which the members of the State governments will carry into the public councils a bias in favor of the general government. A local spirit will infallibly prevail much more in the members of Congress, than a national spirit will prevail in the legislatures of the particular States. Every one knows that a great proportion of the errors committed by the State legislatures proceeds from the disposition of the members to sacrifice the comprehensive and permanent interest of the State, to the particular and separate views of the counties or districts in which they reside. And if they do not sufficiently enlarge their policy to embrace the collective welfare of their particular State, how can it be imagined that they will make the aggregate prosperity of the Union, and the dignity and respectability of its government, the objects of their affections and consultations? For the same reason that the members of the State legislatures will be unlikely to attach themselves sufficiently to national objects, the members of the federal legislature will be likely to attach themselves too much to local objects. The States will be to the latter what counties and towns are to the former. Measures will too often be decided according to their probable effect, not on the national prosperity and happiness, but on the prejudices, interests, and pursuits of the governments and people of the individual States. What is the spirit that has in general characterized the proceedings of Congress? A perusal of their journals, as well as the candid acknowledgments of such as have had a seat in that assembly, will inform us, that the members have but too frequently displayed the character, rather of partisans of their respective States, than of impartial guardians of a common interest; that where on one occasion improper sacrifices have been made of local considerations, to the aggrandizement of the federal government, the great interests of the nation have suffered on an hundred, from an undue attention to the local prejudices, interests and views of the particular States. I mean not by these reflections to insinuate, that the new federal government will not embrace a more enlarged plan of policy than the existing government may have pursued; much less, that its views will be as confined as those of the State legislatures; but only that it will partake sufficiently of the spirit of both, to be disinclined to invade the rights of the individual States, or the prerogative of their governments. The motives on the part of the State governments, to augment their prerogatives by defalcations from the federal government, will be

overruled by no reciprocal predispositions in the members.

Were it admitted, however, that the Federal government may feel an equal disposition with the State governments to extend its power beyond the due limits, the latter would still have the advantage in the means of defeating such encroachments. If an act of a particular State, though unfriendly to the national government, be generally popular in that State, and should not too grossly violate the oaths of the State officers, it is executed immediately and, of course, by means on the spot and depending on the State alone. The opposition of the federal government, or the interposition of federal officers, would but inflame the zeal of all parties on the side of the State, and the evil could not be prevented or repaired, if at all, without the employment of means which must always be resorted to with reluctance and difficulty. On the other hand, should an unwarrantable measure of the federal government be unpopular in particular States, which would seldom fail to be the case, or even a warrantable measure be so which may sometimes be the case, the means of opposition to it are powerful and at hand. The disquietude of the people; their repugnance and, perhaps, refusal to cooperate with the officers of the Union; the frowns of the executive magistracy of the State; the embarrassments created by legislative devices, which would often be added on such occasions, would oppose, in any State, difficulties not to be despised; would form, in a large State, very serious impediments; and where the sentiments of several adjoining States happened to be in unison, would present obstructions which the federal government would hardly be willing to encounter.

But ambitious encroachments of the federal government, on the authority of the State governments, would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm. Every government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole. The same combinations, in short, would result from an apprehension of the federal, as was produced by the dread of a foreign, yoke; and unless the projected innovations should be voluntarily renounced, the same appeal to a trial of force would be made in the one case as was made in the other. But what degree of madness could ever drive the federal government to such an extremity. In the contest with Great Britain, one part of the empire was employed against the other. The more numerous part invaded

the rights of the less numerous part. The attempt was unjust and unwise; but it was not in speculation absolutely chimerical. But what would be the contest in the case we are supposing? Who would be the parties? A few representatives of the people would be opposed to the people themselves; or rather one set of representatives would be contending against thirteen sets of representatives, with the whole body of their common constituents on the side of the latter.

The only refuge left for those who prophesy the downfall of the State governments is the visionary supposition that the federal government may previously accumulate a military force for the projects of ambition. The reasonings contained in these papers must have been employed to little purpose indeed, if it could be necessary now to disprove the reality of this danger. That the people and the States should, for a sufficient period of time, elect an uninterrupted succession of men ready to betray both; that the traitors should, throughout this period, uniformly and systematically pursue some fixed plan for the extension of the military establishment; that the governments and the people of the States should silently and patiently behold the gathering storm, and continue to supply the materials, until it should be prepared to burst on their on heads, must appear to every one more like the incoherent dreams of a delirious jealousy, or the misjudged exaggerations of a counterfeit zeal, than like the sober apprehensions of genuine patriotism. Extravagant as the supposition is, let it however be made. Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government: still it would not be going too far to say, that the State governments with the people on their side, would be able to repel the danger. The highest number to which, according to the best computation, a standing army can be carried in any country, does not exceed one hundredth part of the whole number of souls; or one twenty-fifth part of the number able to bear arms. This proportion would not yield, in the United States, an army of more than twenty-five or thirty thousand men. To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. It may well be doubted, whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with

the late successful resistance of this country against the British arms, will be most inclined to deny the possibility of it. Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of. Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms. And it is not certain, that with this aid alone they would not be able to shake off their yokes. But were the people to possess the additional advantages of local governments chosen by themselves, who could collect the national will and direct the national force, and of officers appointed out of the militia, by these governments, and attached both to them and to the militia, it may be affirmed with the greatest assurance, that the throne of every tyranny in Europe would be speedily overturned in spite of the legions which surround it. Let us not insult the free and gallant citizens of America with the suspicion, that they would be less able to defend the rights of which they would be in actual possession, than the debased subjects of arbitrary power would be to rescue theirs from the hands of their oppressors. Let us rather no longer insult them with the supposition that they can ever reduce themselves to the necessity of making the experiment, by a blind and tame submission to the long train of insidious measures which must precede and produce it.

The argument under the present head may be put into a very concise form, which appears altogether conclusive. Either the mode in which the federal government is to be constructed will render it sufficiently dependent on the people, or it will not. On the first supposition, it will be restrained by that dependence from forming schemes obnoxious to their constituents. On the other supposition, it will not possess the confidence of the people, and its schemes of usurpation will be easily defeated by the State governments, who will be supported by the people.

On summing up the considerations stated in this and the last paper, they seem to amount to the most convincing evidence, that the powers proposed to be lodged in the federal government are as little formidable to those reserved to the individual States, as they are indispensably necessary to accomplish the purposes of the Union; and that all those alarms which have been sounded, of a

meditated and consequential annihilation of the State governments, must, on the most favorable interpretation, be ascribed to the chimerical fears of the authors of them.

Publius (James Madison)

Can the Second Amendment Survive?

by Ashley Halsey, Jr.

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As of this moment, it is the official position of the Federal Government that the Second Amendment does not protect the right of individual citizens to keep and bear firearms.

The exact words used are that "the Second Amendment does not apply to private citizens as an individual right." Although that flat statement was made at a relatively low level - by an Assistant U.S. Attorney in Indiana this Jan. 5 - a spokesman for the U.S. Department of Justice in Washington, D.C. confirmed that it is the government's current stand.

The official declaration that the Second Amendment is a dead letter so far as individual gun owners are concerned, while shocking in its bluntness, came as no surprise to those in Washington long familiar with the legal situation. The government's position goes back, in fact, to a 1939 decision of the U.S. Supreme Court in an obscure case involving a sawed-off shotgun.

From a gun owner viewpoint, the big and burning question at present is whether the high court interpreted the Second Amendment wrongly nearly 34 years ago, and if it was wrong, what can be done about it now?

To many knowledgeable citizens including several Past Presidents of The National Rifle Association who are highly-regarded lawyers, the court appears to have made a grave mistake which now rises to plague the civil rights of 50 to 100 million law-abiding and well-intentioned American firearms owners.

The second Amendment which the Supreme Court undertook to interpret in 1939, is one of the briefest of 10 safeguards to individual American liberties which were written into the Constitution of the United States in the early days of the Republic. It says in its entirety:

A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

Due to the curious sentence structure and location of the three commas that punctuate this single important paragraph, its precise meaning has long been debated.

Back in 1939, in an even more curiously constructed sentence, the Supreme Court held in the language of Associate Justice James C. McReynolds that:

With obvious purpose to assure the continuation and render possible the effectiveness of such forces (as the militia) the declaration and guarantee of the Second Amendment were made. It (the Second Amendment), must be interpreted and applied with that end in view.

(Note: The two phrases in parentheses above were not part of the original decision, but have been inserted to make clear what it is about.)

In short, the court ruled that the Second Amendment was intended simply and solely to support the militia, which the court, in 1939, evidently regarded as the National Guard and perhaps a few state reserve units.

In writing the court decision, Justice McReynolds reviewed early American laws on the militia and stated that there was no evidence before the high court to show that a sawed-off shotgun, the firearm in question, "is any part of the ordinary military equipment or that its use could contribute to the common defense."

Despite its far-reaching effect, the case seems to have created little stir when it occurred. The NRA took no cognizance of it and *The American Rifleman* made no mention of the matter, perhaps because of its obscure origin.

The case arose under the National Firearms Act of 1934, originally passed to curb gangster shootings, when two men named Jack Miller and Frank Layton were charged with illegally transporting a sawed-off 12 ga. shotgun across State lines from Oklahoma into Arkansas. The Federal government alleged that the shotgun, a Stevens, had been chopped to a barrel length shorter than the 18" legal minimum then and still in effect.

The two defendants argued through counsel that the 1934 act violated their constitutional rights to bear arms under the Second Amendment. A U.S. District Judge agreed, and threw the case out of his court. The government then appealed to the Supreme Court, and Justice McReynolds wrote the decision holding that the right to bear arms under the Second Amendment applied only to the militia.

The only member of the 1939 court still on the bench, Associate Justice William Douglas, took no part in the 1939 decision but quoted that decision only last June in the case of Robert Williams, convicted in Connecticut of carrying an illegal handgun tucked in his waistband. (*Adams, Warden v. Williams, 407 US 143*)

"This problem is an acute one," Douglas said, "because of the ease with which anyone can acquire a pistol,...A powerful lobby dins into the ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment." But, Douglas continued, there is no constitutional reason "why stiff State laws governing the purchase and possession of pistols may not be enacted ... There is no reason why all pistols would not be barred to everyone except the police."

The juridical attitude taken by the Supreme Court in 1939 and by Justice Douglas in 1972 was echoed in connection with a lawsuit by NRA Life Member Lewis Gene Freeman, of 1509 Pontiac Dr., Kokomo, Ind. 46901. Freeman, acting as his own attorney at the time, sued last Aug. 10 as an individual gun owner to have the 1968 Federal Gun Control Act declared unconstitutional. He alleged that the act violated the First, Second, Fourth, Fifth, and Eighth Amendments, among others.

In his suit, Freeman, who incidentally relies on fellow gun owners for financial aid, contends that the refusals of gun dealers in other States to sell him rifle, shotgun and pistol because of GCA68 "impair" his efficiency as a member of the unorganized militia by withholding appropriate arms.

The government moved to throw out the suit, contending that it could not be sued without its own consent. Freeman amended his suit with some legal coaching from lawyer David I. Caplan, and NRA Member in New York City. In opposing this Assistant U.S. Attorney Richard L. Darst advanced the argument early this year that the Second Amendment does not apply to

individual citizens because of the 1939 decision *U.S. vs. Miller*, (307 U.S. 174-183).

That the position taken by the Assistant U.S. Attorney in Indianapolis represents the basic position of the Department of Justice was verified by a department spokesman in Washington who asked, however, that he not be quoted by name. The spokesman said almost apologetically that the 1939 Supreme Court decision left the Department of Justice no choice.

Viewed broadly, much of major significance on the right to bear arms appears to have gone overlooked or deliberately ignored through the years in all this prancing procession of legalism. Among other things apparently never fully considered are:

1. The original concept and intent behind the Second Amendment.

2. Similar or stronger provisions in at least 35 State Constitutions.

3. Use of shotguns, sawed-off or not, as military arms in most U.S. wars.

4. A 1903 U.S. law defining the militia as not only the National Guard but all able-bodied males between 18 and 45.

To take up these points one by one:

Where the purpose of any constitutional provision or law is vague, obscure or under deep question, a recognized procedure is to dig back to the thoughts and words of those who originally framed it.

To do this with the Second Amendment, one has simply to look up the wisdom of George Mason (1725-1792), the great Virginia constitutionalist. Mason wrote more safeguards of individual rights into the Virginia Constitution of 1776 than the original U.S. Constitution of 1787 contained. The first 10 Amendments of the "Bill of Rights", when added to the U.S. Constitution in 1791, were largely what Mason had written.

The papers of George Mason reveal quite clearly what he meant by "militia" and his definition is far broader than that of the Supreme Court as enunciated by Justice McReynolds. During a debate in Richmond June 16, 1788, Mason spoke rhetorically. "I ask who are the

militia?" he said, and then answered his own question with the words: "They consist now of the whole people, (emphasis added) except a few public officials."

(See *The Papers of George Mason*, "R. A. Rutland, editor, Chapel Hill, N.C., The University of North Carolina Press, 1970, Vol. III, pp. 1067-68, 1070-71, 1081, for fuller details.)

So there can be little doubt that George Mason, "Father of the Bill of Rights," never intended to restrict the right to bear arms to a relatively few men in uniform.

An often-identical line of thought is reflected in many of the State Constitutions adopted either during the early days of the Republic or in later years. In 35 of the 50 States, the rights of gun owners are defined by State Constitutions. If the Second Amendment does not extend to these States, certainly the State Constitutions would seem to be the highest law in such cases under the Ninth and Tenth Amendments, which reserve to the States and "the people" all rights and powers not spelled out in the U.S. Constitution. Justice Douglas appears to have ignored this when he asserted last June that he saw nothing to prevent "stiff State laws" against handguns, even to the point of prohibiting private ownership.

At least half of the State Constitutions go beyond the Second Amendment by spelling out that the right to bear arms is an individual right for personal protection or defense of home and property, and has nothing to do with a "well-regulated militia." These States are: Alabama, Arizona, Colorado, Connecticut, Florida, Georgia, Idaho, Indiana, Kentucky, Michigan, Mississippi, Missouri, Montana, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, and Wyoming.

Arizona's Constitution, for example, says "the right of the individual citizen to bear arms in defense of himself or the State shall not be impaired...: Michigan's says, "every person has a right to keep and bear arms for the defense of himself and the State." Pennsylvania's is emphatic: "The right of the citizens to bear arms in defense of themselves and the State shall not be questioned." (*Emphasis added.*)

How, in the light of such ringing declarations, some may ask, can Justice Douglas assert that such States can prohibit the private ownership of handguns or, for that matter, any other arms?

When Justice McReynolds could find nothing of

record on the use of sawed-off shotguns by the military, he obviously had not looked far or thoroughly. Perhaps the Supreme Court was compelled to confine its consideration of the facts, as differentiated from points of law, to whatever facts were presented in the lower court. But the indisputable truth of the matter is that short-barrel shotguns have been widely used in war.

The U.S. Government has bought more than 125,000 12-ga. pump guns, usually with 18" or 20" barrels, for military purposes during the present century. It purchased 100,000 Ithaca Model 37's under a single government contract in the 1960's to arm South Vietnamese village defense forces. During World War I, it bought some 30,000 Winchester and Remington 12-ga. pumps for use primarily as "trench guns" in France.

So deadly were the "trench guns," throwing loads of nine 00 buckshot, that the German Foreign Office formally protested against this "barbarous" American weapon Sept. 15, 1918, via the Swiss Government and threatened to execute any Americans caught armed with it.

The U.S. stuck to its shotguns. It based its reply on a legal opinion of the Judge Advocate General of the U.S. Army which should be of profound interest in any future legal issue over whether a shotgun can serve as a military arm. The Judge Advocate General affirmed that it certainly could, although developments of modern warfare limited its use tactically.

". . . Gen. John J. Pershing, commander-in-chief of the American Expeditionary Force (in France in 1917-18) was thoroughly sold on the use of shotguns, and if the war had continued they no doubt would have been used in great numbers on all fronts," writes Col. Robert H. Rankin, USMC (Ret'd), in his new book entitled *Small Arms in the Sea Services*, (N. Flayderman & Co., Inc., New Milford, Conn., 06776, 227 p. \$14.50). Rankin continued:

Incidentally, shotguns were found to be most effective in the jungle fighting in the South Pacific and they were found to be very useful in repulsing the human wave attacks launched by the Chinese Communists in Korea. They have also been used with success in Viet Nam. Battle-wise veterans will be quick to tell you that it is a mighty useful piece of ordinance to have around.

The final touch to the sawed-off shotgun controversy is an official World War I report (see below) which refers to the arms as "sawed-off"--leaving little or no question of the status of a short-barrel shotgun as military arm.

As for who constitutes the "militia" under the Second Amendment, Congress has spoken firmly on the subject. On Jan. 21, 1903, Congress defined the militia as consisting of all able-bodied male citizens "more than 18 and less than 45 years of age," and divided them into two classes, "the organized militia, to be known as the National Guard of the State, Territory or District of Columbia, and **the remainder to be known as the Reserve Militia.**" (*Emphasis added.*)

Thus the Congress classified all able males between 18 and 45, not in the National Guard, as members of the militia. These men would now seem to be the "people to keep and bear arms" whose right to firearms "shall not be infringed" under the Second Amendment. Further, under the broad doctrine of equal rights, it would appear that women also should be included if they fall into age groups eligible for military service. Nor, to judge by some recent court decisions, should there be discrimination due to age.

So, in summation, a sawed-off shotgun IS a military arm notwithstanding the 1939 decision; the militia includes not only the National Guard but all able-bodied young and middle - aged males and perhaps many more; the Second Amendment was not intended to apply only to militia, anyhow, but to the "whole people," and where it does not protect the rights of individual gun owners, State Constitutions in 50% of the States do so.

The next time a firearms case that does not involve the Federal government arises, it would be interesting to see the U.S. Department of Justice intervene as a "friend of the court" on behalf of the rights of individual gun-owning citizens. It has done so in recent years for almost every other minority element of our citizenship. Why shouldn't it act to protect the largest minority, the law-abiding American gun owners?

**THE RIGHT TO KEEP
AND BEAR ARMS**
by **John Santee**

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I. Introduction

In recent years, there has appeared mounting sentiment for governmental regulation of the purchase, sale, possession, ownership and use of firearms. This rising clamor has been precipitated and fueled again and again by assassinations and attempted assassinations of national and local leaders, by seemingly uncontrollable increases in the rate of crime, particularly crime of violence, and by attacks by terrorists and other extremist groups. A frequent comment made in the national debate by opponents of gun control legislation is that governmental regulation of the types envisioned would infringe upon the individual's "right to keep and bear arms," which is said to be protected by the second amendment to the Federal Constitution. The second amendment provides, "A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed."

The number of judicial decisions interpreting the right to bear arms has been relatively small. However, those few decisions which have been rendered, as well as the interpretations suggested by the commentators, have unanimously stressed the importance of the historical development of the second amendment and the purposes behind its enactment as keys to its meaning.¹ These historical considerations have led the courts and commentators to conclude that the sole purpose of the second amendment was to ensure the right of the states to maintain militias in a state of preparedness so as to provide protection against the possibility of

an oppressive national government and to avoid the need for standing armies. They have determined that the amendment was not meant to protect an individual right to own and possess firearms except as such ownership and possession relates to the preservation of the state militias.² Finally, it is now clear that the second amendment operates solely as a restriction on the federal government and that state firearm regulations are therefore restricted only by similar state constitutional provisions.³ This Note will evaluate the conclusions which have been reached pertaining to the scope and meaning of the second amendment, as well as examine various state constitutional provisions which affect the right to keep and bear arms.

II. English Background

It is well established that many of the American political traditions and institutions trace their origins back into English history. One particular segment of English history, the experience of the English people with standard armies and militias which led to the promulgation of the English Bill of Rights of 1689, is generally considered to be the conscious and direct antecedent of the second amendment.⁴

The history of that part of the seventeenth century which preceded enactment of the English Bill of Rights was one of an unending struggle between the crown and its subjects, which finally culminated in civil war 1642.⁵ This period was marked by the assertion of boundless royal powers by the king and the use of large standing armies in enforcing the dictates of the crown.⁶ When the monarchy was abolished at the end of the civil war. Its arbitrary rule was merely replaced by a military dictatorship, created and maintained largely by force of arms and the support of a disciplined standing army.⁷

This military rule intensified the English people's hatred and distrust of standing armies.⁸ Therefore, when the monarchy was finally restored under Charles II, the militia system was revived and again relied upon for the country's defense.⁹ A militia comprised of the able-bodied members of the community had long been viewed as preferable to professional standing armies in protecting the security and freedom of the state and its inhabitants.¹⁰ From early times, the English landed proprietors had

been required to equip and maintain their tenants and retainers as men-at-arms for military service when needed by the government.¹¹ This had constituted the militia, which had long been the sole military force of the kingdom.

During Charles II's reign, politics was dominated by religious controversy, and especially by the prospect that the King's Catholic brother, the Duke of York, would succeed to the throne.¹² In reaction to the fear of Catholic domination of the government, the Protestant Parliament passed two Test Acts which barred Catholics from all civil and military offices and from both houses of Parliament.¹³

In 1685, Charles II died and the Catholic Duke of York ascended to the throne as James II. He was determined to force Catholicism on England and was willing to use any means to do so, including openly violating the law.¹⁴ Toward this end, James II increased the size of the standing army to 30,000 and asked Parliament to completely abandon the militia in favor of standing armies, asserting that the militia system was too inefficient to rely upon protection from domestic and foreign enemies. This Parliament refused to do.¹⁵ In addition, James II replaced Protestant army officers and soldiers with Catholics, in a clear contravention of the Test Act;¹⁶ replaced Protestants with Catholics throughout the government, particularly at important military posts; quartered the troops in private homes, in clear violation of existing laws; and stationed 13,000 men just outside London in case it became necessary to hold the city in subjugation.¹⁷ These actions greatly alarmed all Protestants and frightened even those persons normally sympathetic to the prerogatives of the Crown who, nevertheless, loathed rule by the military and strongly believed in the need for the Test Act.¹⁸ When James II's wife gave birth to a son, thereby creating the possibility of a long line of Catholic rulers, revolution resulted. Protestant William of Orange and his wife Mary, daughter of James II, were offered the Crown, and James II was forced to flee the country.¹⁹

After William and Mary arrived in England, Parliament drafted a declaration, called the Declaration of Rights, which was meant to represent its understanding of the proper relationship between Parliament, the Crown, and the people. Parliament required William and Mary to accept the provisions of the declaration before it would recognize them as England's rightful rulers.²⁰ English Bill of Rights of 1689,²¹ which consisted of two parts:

(1) an enumeration of particular abuses said to have been engaged in by James II; and (2) a declaration of certain "ancient rights and liberties."²²

The abuses referred to in the first part of the statute relevant to present discussion are the assertions that James II

5. By raising and keeping a standing army within this kingdom in time of peace, without consent of parliament, and quartering soldiers contrary to law.

6. By causing several good subjects, being protestants, to be disarmed at the same time when papists were both armed and employed contrary to law.²³

As one commentator has pointed out, these grievances were not intended to assert that James II disarmed Protestants in any literal sense, but instead referred to his practice of replacing Protestants with Catholics at important military posts, thereby excluding Protestant participation and influence in the affairs of the standing army. This section of the statute also referred to James II's desire to abandon the militia in favor of a standing army, thereby precluding Protestant participation in the one type or organized armed force which could have been called upon to resist impositions by the Catholic James II and his Catholic standing army.²⁴ The corresponding declaration of rights proclaimed:

6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law.

7. That the subjects which are protestants, may have arms for their defense suitable to their conditions, and as allowed by law.²⁵

When the enumeration of abuses and the declaration of rights are read together, in the seventeenth century context of religious strife, arbitrary royal rule, fear of standing armies, and trust in the militia, the conclusion reached by various courts²⁶ and commentators²⁷ has been that the English Bill of Rights was not intended to create or reaffirm any personal right of individuals to possess and use weapons. Rather, the Declaration has been

interpreted as a reiteration of the preference for militias over standing armies, as a prohibition against future attempts to abolish the militia, and as an assertion of the rights of Protestants to participate in the militia. The grievance addressed in the Bill of Rights was the maintenance by the king of a large standing army, quartered among the people, through which he could force his subjects, and especially the Protestants, to submit to his arbitrary rule.²⁸ The English people's faith in citizen militias convinced them that the maintenance of an efficient militia was necessary so that the populace could force an oppressive government to respect their rights or, if need be, to rise up in resistance as a collective body to force the oppressors to surrender the government.²⁹ It was in this sense - through the existence of a militia - that the Protestants could "have arms for their defense."

The abuses noted in the Bill of Rights and the remedy which was believed would preclude such future abuses became entrenched in Anglo-Saxon political thought.³⁰ The framers of the American Bill of Rights were very familiar with English history and deeply impressed by the leading political thought of the day.³¹ When the American colonists were presented with a situation comparable to that with which the English had been presented, the conclusions reached about standing armies and militias in England molded American thought and influenced the framers' perceptions of the proper relationship between the government and the governed.

III. American Origins

A. Colonial America

When the Federal Constitution was written, the provisions included were the product of both the prevailing political thought of the day and the former colonists' experiences with the mother country. In particular, these experiences influenced the framing of the second amendment and so must be examined in ascertaining its intended meaning.

The most important of these experiences related to England's employment of professional standing armies to carry out its dictates in America. The English immigrants to colonial America brought with them their fear of standing armies.³² This fear was particularly characteristic of those colonists who had fled England as a result of the military rule pursued by Cromwell

and James II.³³

The Colonial distrust of standing armies was intensified by the conflicts between King George III and the colonists. It was the deeply-held belief of the colonists that the rights possessed by Englishmen were just as applicable in America as they were in England.³⁴ They were willing to acknowledge the King's authority, but they insisted that it be exercised in accordance with their colonial charters and with the same limitations that restricted the King's power in England.³⁵ However, George III and Parliament, at that time under the firm control of the King, did not recognize such restrictions. Both believed that the King's authority over his subjects in America was unfettered and free of any of the restraints which limited his power in England.³⁶

In order to compel the colonies to accept his absolute authority, George III maintained a large army in America.³⁷ The colonists found the presence of these troops during times of peace very objectionable and were outraged by the use of these forces to enforce what they already considered to be arbitrary and oppressive laws.³⁸

Most objectionable to the colonists as threats to individual liberty were the measures utilized to maintain military rule in the colonies.³⁹ One measure particularly complained of was the quartering of troops in private homes in peacetime without the consent of the owners.⁴⁰ Another aspect of military rule which was repulsive to the colonists was the eventual imposition of martial law and the trial of civilians by courts-martial.⁴¹ These actions strengthened the colonists' belief that such oppressive measures were the usual consequence of the existence of a standing army.⁴² Furthermore, the use of an armed force by George III as an instrumentality of his arbitrary rule deepened the conviction of American colonists that a standing army was excessively susceptible of being utilized for the usurpation of power by a strong central government.⁴³ As a result of these perceptions, the colonists' belief that standing armies constituted a threat to the liberties of the people was greatly intensified.

The militia system was long perceived by Americans as the preferable means of defense in a free nation⁴⁴ because it eliminated the need for standing armies except in extraordinary circumstances.⁴⁵ The colonists always relied upon the militia system⁴⁶ and found it to be an adequate method of protection.⁴⁷ To ensure the existence of an adequate number of militiamen when the need arose, every male of military age and capacity was

required by law to be enrolled for military service.⁴⁸ Furthermore, because colonial treasuries were sparse, every militiaman was also required by law to provide at his own expense specified weapons and related equipment.⁴⁹ Therefore, the colonists believed that individual ownership and possession of weapons was of the utmost importance in order to maintain the militia as a strong and viable means of defense.

Weapons were also important in colonial America and in the early days of the nation as vital tools for the frontiersman. In an era of self-sufficiency, weapons were needed for obtaining the food upon which a large part of the populace was forced to rely for survival.⁵⁰ Furthermore, firearms were important as a means of personal protection from wild animals, roving gangs of bandits, and Indians.⁵¹ However, it has been asserted that these considerations did not influence the enactment of the second amendment by the Congress or its adoption by the various ratifying conventions.⁵² This observation appears to be correct. The Constitution and the Bill of Rights were clearly addressed to the political structure of the new government and its relationship to individual rights. The use of firearms for hunting and self-defense, however, while certainly important to the colonists, was not a matter which related to the concerns addressed in the Constitution and the Bill of Rights and was not so important as to be of constitutional significance.

B. State Ratifying Conventions

After the federal Constitution was drafted at the Constitutional Convention in 1787, it was submitted to the states for ratification. The ratification process became a battle between the proponents of the Constitution - the "Federalists" - and its opponents - the "Anti-Federalists." The Anti-Federalists soon adopted as their main point of objection to the Constitution the absence of a bill of rights to serve as a restraint on governmental power. This objection eventually resulted in the recommendation of amendments by the ratifying conventions of several key states.

Although the number of states required for ratification had done so, Virginia has not yet assented, and it was believed that a permanent union government without Virginia, the wealthiest and most populous of the states was impossible.⁵⁵ The Virginia Anti-Federalists were therefore determined to prevent ratification or to exact recommendations for constitutional amendments which

they thought were necessary to preserve and protect the liberties of the states and the people under the new system of government.⁵⁶ When it eventually became apparent to the Virginia Federalists that they did not have the votes necessary for ratification, they agreed to accept the recommendation of amendments as a concession to the opposition.⁵⁷ Upon approval ratification by a vote of 89 to 79, a committee, headed by the most resolute of the Virginia Anti-Federalists, Patrick Henry and George Mason, was chosen to present proposed amendments.⁵⁸ This committee's product consisted of forty proposed amendments, the first twenty of which were in the nature of a bill of rights.⁵⁹

The seventeenth article of the proposed bill of rights read as follows:

Seventeenth, That the people have a right to keep and bear arms; that a well regulated Militia composed of the body of the people trained to arms is the proper, natural and safe defence of a free State. That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the Community will admit; and that in all cases the military should be under strict subordination to and governed by the Civil power.⁶⁰

It is submitted that this recommended amendment has a greater impact on Madison's ultimate proposal than any other provision which could then be found in an existing state bill of rights or in a ratifying convention's proposed constitutional amendments. The reasons for this conclusion are several. First, Madison was a native of Virginia and therefore in all probability felt a duty to especially consider the desires of the people of his state.⁶¹ Second, the impact of all the proposals of the Virginia ratifying convention can be discerned by the fact that, apart from the provisions in the first seven articles and in the tenth and twelfth articles which merely set forth in general terms certain principles believed to be political truths, every specific provision in the proposals was presented by Madison in his proposed amendments and all but one became part of the Bill of Rights.⁶² In addition, it has been suggested that Madison may have been

partial toward the Virginia proposals because in sponsoring the amendments he was fulfilling a campaign promise made to Virginians which had played an important part in his election to Congress.⁶³

If it is true that Virginia's proposal had a great impact on Madison's proposed amendment, much can be learned about the intended meaning of the second amendment by examining the Anti-Federalists' concerns to which the Virginia proposal was addressed. The major object of Anti-Federalist concern in this respect was article I, section 8, clause 16 of the Constitution, the so-called militia clause. This clause stated that Congress shall have the power:

To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.⁶⁴

It was the view of the Anti-Federalists that this clause gave Congress the exclusive power to provide for arming the militia and prevented the states from doing so themselves.⁶⁵ This, feared the Anti-Federalists, would permit the Congress to disarm the state militias by neglecting to provide for their arms and thereby render them useless.⁶⁶ The Anti-Federalists argued that the elimination of the militias and the establishment of a standing army would allow the national government to strip the people of their liberties, as had occurred throughout history whenever a standing army had been established.⁶⁸

The Federalists contended that the power of Congress to arm the militia was not exclusive, but rather, concurrent with the states; hence, the states could arm the militia if Congress failed to do so.⁶⁹ However, the Anti-Federalists best by implication.⁷⁰ Already apprehensive about the powers of the federal government, the Anti-Federalists were not content to set forth such an important right by implication.⁷¹ Therefore, the Anti-Federalists insisted upon an express statement in the Constitution that the states would also have the power to arm the militia.

This, therefore, was the concern of the Anti-Federalists and the basis for the amendment which was proposed by the

Virginia ratifying convention and by Madison. It is true that until this time, each individual militiaman was required to supply his own weapons,⁷² which has been said to indicate that the possession of arms for this purpose was to be constitutionally protected.⁷³ However, no mention was ever made during the Virginia debates as to the **means** the states could employ to arm the militia; the only constitutional protection which was desired by the Anti-Federalists was of the right of the states to arm the militias. Furthermore, at no point during the Virginia debates was an allusion made to the absence of a provision guaranteeing an individual right to own and possess weapons for other than militia purposes.⁷⁴

D. Madison's Proposed Amendment

On June 8, 1789, James Madison introduced his proposed amendments in the House of Representatives. The fourth paragraph of the fourth proposal read:

The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.⁷⁵

The intended purpose of this proposed amendment was clearly to ensure that the states retained the power to arm the militia so as to preserve their effectiveness as an instrument of defense. The provision declares, in effect, that because a well-armed militia is necessary, any action which would cause the militia to become less than well-armed shall be prohibited.⁷⁶ The proposal was not intended to protect an individual right, but rather the collective right of the people to keep and bear arms in the form of a well-armed militia.⁷⁷ In short, "the right to keep and bear arms is the right to maintain an effective militia."⁷⁸

IV. Judicial Interpretation

A. Federal Court Decisions

The number of cases in which the second amendment has been subjected to judicial interpretation is very small. One important reason for this is that the United States Supreme Court has held that the second amendment is a limitation on the federal government only and does not restrict state legislation.⁷⁹ Therefore, most of the cases which examine the second amendment are federal court decisions.

The Supreme Court decision restricting the application of the second amendment to federal legislation was **United States v. Cruikshank**.⁸⁰ In **Cruikshank**, the defendants had been convicted of violating the Civil Rights Enforcement Act of 1870⁸¹ by conspiring to deprive two black citizens of the free exercise and enjoyment of rights and privileges granted and secured to them by the Constitution and laws of the United States.⁸² One such right, the plaintiff's enjoyment of which the defendants were alleged to have prevented was the right under the second amendment to keep and bear arms for a lawful purpose. The Supreme Court reversed the convictions, finding that no offense indictable under the federal act had occurred since this right is not one granted or secured by the federal Constitution. The Court stated:

The second and tenth counts are equally defective. The right there specified is that of "bearing arms for a lawful purpose." This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this...means no more than that it shall not be infringed; but this...means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to what is called...[the police powers].⁸³

The principle that the second amendment is a limitation only upon the federal government and not upon the states was reaffirmed by the Supreme Court in two subsequent cases, **Presser v. Illinois**⁸⁴ and **Miller v. Texas**.⁸⁵ However, it is important to note that the opinions in **Cruikshank**, decided in

1876, *Presser*, decided in 1886, and *Miller v. Texas*, decided in 1894, were all rendered during the era when the prevailing principle was that elucidated by Chief Justice Marshall in *Baron v. Mayor of Baltimore*,⁸⁶ which had held that the Bills of Rights does not apply to and restrict the states.⁸⁷ Since that time, many other provisions of the Bill of Rights have been held to be applicable to the states through the fourteenth amendment.⁸⁸ However, no case raising this issue as to the second amendment has reached the Supreme Court since it decided *Miller v. Texas* in 1894, well before the initiation of the "selective incorporation" process, although this principle has been reaffirmed on a number of occasions by state court decisions.⁸⁹

The question is therefore raised whether the Supreme Court, if faced with the issue, would reaffirm its previous holding in *Cruikshank*, *Presser*, and *Miller v. Texas* or would instead apply the restrictions of the second amendment to the states. One commentator has suggested that it is possible that the Supreme Court would find the second amendment applicable to the states through the fourteenth amendment.⁹⁰ He notes that under the analytical frame work which the Court appears to use, "the 'fundamentalness' of a right dictates its applicability to the states" and that, under this test, "there is much to suggest that the second amendment should be so construed."⁹¹ However, the right referred to as "fundamental" by this commentator is an individual right to bear arms,⁹² an interpretation of the second amendment which is contrary to that which has been made by the Supreme Court.⁹³ Therefore, it does not appear likely that the second amendment, under the meaning currently attributed to it, could be held to be a fundamental right which would apply to the states through incorporation in the fourteenth amendment.

A second commentator has suggested that the second amendment restricts the states in a different fashion. He notes that article I, section 8, clauses 15 and 16 of the Constitution give Congress the power to provide for the arming, organizing, disciplining and calling forth of the militia. In light of these constitutional provisions, he asserts that it is possible to view the second amendment as protecting "the right of the Federal government to have at its disposal a militia, the right of whose members 'to keep and bear arms' may not be infringed by state governments."⁹⁴ The author of this theory claims that his interpretation is supported by dictum found in *Presser v. Illinois*.⁹⁵

In **Presser**, the defendant had been convicted of violating an Illinois statute which required any body of men which sought to form an organized militia or military unit or to drill or parade with arms in any city or town to first obtain a permit from the governor before they could meet or drill within the state. Presser had violated the statute by leading a parade of 400 rifle-bearing members of a German nationalist organization without first procuring the permit. On appeal, Presser admitted that the second amendment was ordinarily a limitation only on the federal government and not on the states. He nevertheless claimed that a state statute would violate the second amendment if it interfered with the right of the people to keep and bear arms for the purpose of forming a militia. Such interference allegedly deprived the federal government of the militia forces it was entitled to call upon by reason of article I, section 8, clause 16 of the Constitution.⁹⁶

The Supreme Court affirmed Presser's conviction on the grounds that the second amendment does not apply to the states. However, the Court also noted in dictum:

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, as well as of its general powers, the States cannot, even laying the constitutional provision in question [the second amendment] out of view, **prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.** But, as already stated we think it clear that the sections under consideration do not have this effect.⁹⁷

This commentator propounding this theory asserted that the Court thereby "recognized that there were limits beyond which a state could not constitutionally go" in restricting the possession of weapons.⁹⁸

It is submitted, however, that the Court's statement in **Presser** places no restrictions on state legislation at the present time. It seems eminently clear that the Court's concern in **Presser** was the availability of armed state militias for use by the federal

government. If the state maintains some militia force which is available for service and which is armed in some manner, it would appear that the state has met any duties it might have and need go no further. Today the state militias are part of the National Guard. It is these units, armed exclusively by the federal government, which provide the federal government with any militia forces it might need.⁹⁹ Thus, state restrictions on the ownership and possession of weapons can in no way hinder the availability of an armed militia and may therefore be constitutionally enacted.¹⁰⁰

Furthermore, in view of the purposes which the second amendment was meant to further, it would seem illogical to apply it to state governments. The second amendment was intended to prohibit any federal action which would prevent a state from arming its militia if the federal government failed to do so. It was thus meant to apply as a prohibition against the disarming of the militias by the federal government, not by the state governments.

The only other case in which the Supreme Court has had occasion to discuss, the scope and meaning of the second amendment was **United States v. Miller**,¹⁰¹ decided in 1939. The National Firearms Act of 1934¹⁰² had imposed a stiff tax on importers, manufacturers, dealers, and transferor of sawed off shotguns, machine guns, and similar weapons and had required the registration of such weapons. The defendants in **Miller** were charged with violating this Act by transporting in interstate commerce an unregistered 12-gauge shotgun with a barrel of less than eighteen inches in length.¹⁰³

The Supreme Court rejected the second amendment challenge to the Act, holding that:

In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" **at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia**, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.¹⁰⁴

This conclusion appears to have been based upon the

Court's determination that the second amendment was enacted "[w]ith [the] obvious purpose to assure the continuation and render possible the effectiveness of...[the militia]." ¹⁰⁵ The Court observed that the militia forces used in colonial America and at the time of the enactment of the second amendment consisted of citizens who were required by law to be available for militia service if the need arose. ¹⁰⁶ The Court also took note of the statutes which required these men to supply their own arms when called for service. ¹⁰⁷ The implicit conclusion of the Court was that, because the maintenance of an armed militia at the time of the enactment of the second amendment depended upon the militiaman's supplying of his own weapons, the individual's right to own and possess weapons exists only if the weapon "at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia." ¹⁰⁸

The precise meaning of the Supreme Court's opinion in **Miller** has seemed unclear to a number of commentators and courts. One commentator has asserted that the decision rested upon a failure of proof, and that had it been shown that the shotgun could effectively contribute to the common defense, the firearm restrictions might have been found to exceed the regulatory power of Congress. ¹⁰⁹

The commentator assails the "pernicious implication" that "[t]he deadlier the weapon, the greater its protection under the second amendment - whether a machine gun, bazooka or ray gun," although he believes that it is very doubtful that the Court intended to establish such a rule. ¹¹⁰

The First Circuit of Appeals was also troubled by this possible interpretation of **Miller** and attempted to clarify its meaning in **Cases v. United States**. ¹¹¹ **Cases** involved a violation of the Federal Firearms Act ¹¹² which made it unlawful for any person who has been convicted of a crime of violence or who is a fugitive from justice to ship or cause to be shipped firearms or ammunition in interstate or foreign commerce or to receive a firearm or ammunition which has been shipped in interstate or foreign commerce. The defendant was convicted of unlawfully receiving a revolver and ammunition. The court, in rejecting the argument that the Federal Firearms Act was violative of the second amendment, considered the Supreme Court's holding in **Miller** and decided that it was not meant to be a general rule applicable to all cases but was instead limited to its facts. ¹¹³

The court's reason for narrowly construing **Miller** was

that the principle established therein, if intended to be a general, comprehensive rule, would achieve totally unreasonable results. Construed as protecting the possession of any weapon bearing a reasonable relationship to the efficiency of a present-day well-regulated militia unit, the second amendment would permit the federal government to regulate only those weapons which could be classified as antiques or curiosities - such as a flintlock musket or a matchbook harquebus. This would mean, concluded the court, that the limitation of the second amendment is absolute, a result too unreasonable to have been intended by the Supreme Court.¹¹⁴

A second unreasonable result which the court believed would flow from a general application of the principle established in *Miller* was that, under such a rule, Congress would be prohibited from regulating the use and possession of distinctly military arms, such as machine guns and anti-tank or anti-aircraft weapons, by private persons who are not present or prospective members of any military unit, even though it would be inconceivable under the circumstances that a private individual could have a legitimate reason for owning or possessing such a weapon. The court felt it was unlikely that the second amendment was intended by its framers to countenance such an unreasonable result.¹¹⁵

The court in *Cases* stated that it would be better, in light of the many factors involved in any determination of the permissible extent of firearm regulation, to forego any attempt to formulate a general rule and to instead decide each case on its own facts.¹¹⁶ It appears to be the court's view that it is not the military usefulness of a particular firearm which will decide whether the weapon may be constitutionally regulated, but rather whether the person possessing the weapon "was or ever had been a member of any military organization" and whether the use of the weapon under the particular circumstances "was in preparation for a military career."¹¹⁷ Because the defendant in *Cases* did not satisfy either of these criteria, the Federal Firearms Act, as applied to the defendant, did not conflict with the second amendment.¹¹⁸

Since the *Cases* decision in 1942, there have been no federal court decisions analyzing either the second amendment or the *Miller* rule in depth. A number of cases have involved second amendment challenges to federal firearm legislation, but in each the court summarily rejected the challenges on the basis of

Miller, by noting that the weapon in question bore no reasonable relationship to the preservation of a well-regulated militia.¹¹⁹ However, it is submitted that the Supreme Court in **Miller** and other federal courts in subsequent cases have misread the applicability of the second amendment in twentieth century America. The second amendment was intended to go no farther than to guarantee effectively armed militias in order to forestall reliance upon a standing army. It was meant to ensure a state's right to arm its militia as it chose if the federal government failed to do so. The right of an individual to possess a weapon for militia service is protected by the second amendment **only** if the state chooses to supply its militia by requiring each militiaman to provide his own weapons, and not if it does so by another method. Under existing federal law, in effect for over sixty years, the federal legislation which would seek to regulate the ownership, possession, and use of weapons by individuals.

B. State Court Decisions

Since the second amendment operates as a limitation only on federal firearm regulation, it is the state constitutions which restrict state regulation. State constitutional provisions are very diverse and have been subject to numerous interpretations. Nevertheless, several tentative generalizations will be set forth.

First, it is important to note that thirteen state constitutions contain no provisions relating to a right to keep or bear arms.¹²¹ In the absence of any constitutional provision, the state courts have had little difficulty in rejecting constitutional challenges to firearm legislation, usually on the grounds that such regulation is a proper subject for the state's police power. However, in a state having no restriction in its own constitution on the permissible scope of state firearm legislation, the question as to whether the second amendment applies to the states takes on greater significance and usually receives more judicial attention.

An illustrative example of a state court decision in a state have no constitutional provision for the right to bear arms in **Burton v. Sills**,¹²² rendered in 1968 by the New Jersey Supreme Court. **Burton** involved a challenge to a New Jersey statutory scheme which provided for the licensing of firearm manufacturers, wholesalers, and retail dealers and required prospective firearm purchasers to first acquire permits and identification cards from the local chief of police.¹²³ The statute

further provided for the licensing of firearm manufacturers, wholesalers, and retail dealers and required prospective firearm purchasers to first acquire permits and identification cards from the local chief of police.¹²³ The statute further provided that no permit and identification card would be issued to certain classes of individuals such as convicted criminals and minors. The challenge to this scheme was rejected by the New Jersey Supreme Court, ultimately on the basis that the state could impose such limitations on the carrying, sale, and possession of weapons as the safety and welfare of the people of the state require. In other words, in the absence of constitutional provision, the regulation will be upheld if it is a proper exercise of the police power.¹²⁴ However, before reaching this result, the court engaged in an extended discussion of the nature and scope of the second amendment finally concluding that it would follow established authority and hold prohibitions of the second amendment inapplicable to state firearm legislation.¹²⁵

One state constitutional provision appears in identical or nearly identical form in several states, Connecticut, Michigan, Pennsylvania, South Dakota, Texas, Washington, and Wyoming. The Michigan version reads: "Every person has a right to keep and bear arms for the defense of himself and the state."¹²⁶ This provision was construed by the Michigan Supreme Court in **People v. Brown**.¹²⁷ The defendant in Brown was convicted of possessing a blackjack in violation of a statute which prohibited the possession, manufacture and sale of certain specified dangerous weapons, such as machine guns, blackjacks, and bombs by all persons except peace officers, certain manufacturers, military personnel, and licensed person. The court noted that the interpretations made by other courts of the second amendment and state provisions had identified the constitutional protection afforded to the possession of weapons in relation to the state's militia and military purposes. However, the Michigan provision, the court stated, was not by its terms limited to militiamen or military purposes, but instead "extends to 'every person' [the right] to bear arms for the 'defense of himself' as well as of the state."¹²⁸ In other words, the Michigan constitutional provision grants to every person an individual right to own and possess weapons for the private defense of person and property. However, the court further recognized that this right is subject to the state's authority to regulate under the police power. Therefore, to preserve the public safety and peace, the state can prohibit the

possession of those weapons which are used as tools of crime and which have no legitimate use as instruments of private defense.¹²⁹ The court declared that the state's exercise of the police power will be upheld if it is reasonable and does not "result in the prohibition of the possession of those arms which, by the common opinion and usage of law-abiding people, are proper and legitimate to be kept upon private premises for the protection of person and property."¹³⁰ A blackjack was not a weapon which, by common usage, was considered legitimate for defense of person and property and, therefore, could be constitutionally proscribed.

All state courts, like the court in **Brown**, have recognized the importance of the state's interest in the regulation of crime and, whatever its particular constitutional provision, have held that any constitutional limitation on the state's power to regulate the possession and ownership of firearms must be subject to the state's police power.¹³¹ The constitutional provisions of many states explicitly provide this.¹³² The Texas provision, for example, which uses language very similar to the Michigan provision construed in **Brown** and which, according to cases interpreting it, also acknowledges an individual right to possess weapons for the private defense of person and property,¹³³ states: "Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime."¹³⁴

Most of the state court decisions have therefore focused upon the degree of permissible state firearm regulation. The earliest type of firearm legislation to be examined and upheld as a constitutional regulation of the possession and use of weapons were statutes prohibiting the carrying of concealed weapons. With the exception of one opinion, **Bliss v. Commonwealth**,¹³⁵ every state court decision to consider a concealed weapons statute has found it constitutional.¹³⁶ In addition, many state constitutional provisions expressly permit the prohibition of carrying of concealed weapons as an exception to any right to bear arms.¹³⁷ Kentucky is one of the states to have such a provision, enacted specifically to overrule the decision rendered in **Bliss**.¹³⁸ The court in **Bliss** was of the opinion that the right to bear arms was an individual one and was absolute, not abridgeable even by the exercise of the police power.¹³⁹ This decision has subsequently been severely criticized by other courts and its declaration that the right to bear arms is absolute has never been accepted by another

court.¹⁴⁰

Also upheld as permissible state regulation against charges of infringement upon a right to bear arms have been statutes prohibiting the carrying of weapons in public places,¹⁴¹ or on the property of another,¹⁴² or while in prison.¹⁴³ The courts have likewise rejected attacks upon state statutes which prohibited the possession or carrying of a firearms without first obtaining a license have also been generally sustained.¹⁴⁶

However, regulations which exceed the scope of the types mentioned produce differing results among the state courts. The state's particular constitutional provision then becomes increasingly significant. A comparison of two state court decisions, **Salina v. Blaksley**,¹⁴⁷ decided in 1905 by the Kansas Supreme Court, and **State v. Kerner**,¹⁴⁸ a 1921 opinion by the North Carolina Supreme Court illustrated this generalization.

The defendant in **Salina** was convicted of carrying a pistol within the city while intoxicated. The Kansas constitutional provision read, "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power."¹⁴⁹ The defendant argued that this provision restricted the legislature's power to prohibit the possession and carrying of weapons by individuals.¹⁵⁰ The court rejected this argument, holding that it was apparent from the terms of the provision that it was intended to refer to the security and defense of the people as a collective body and not as individuals. The court stated: "It deals exclusively with the military. Individual rights are not considered in this section...[T]he provision in question applies only to the right to bear arms as a member of the state militia, or some other military organization provided for by law..."¹⁵¹ Therefore, according to the Kansas Supreme Court, the state constitutional provision is a limitation on the legislature's power to regulate or prohibit the possession or carrying of weapons.¹⁵²

This expansive view of the legislature's power to enact firearm regulations is in sharp contrast with the view taken by the North Carolina Supreme Court in **State v. Kerner**.¹⁵³ In **Kerner**, the defendant had been charged with violating a statute which prohibited the carrying of a weapon off his premises, even if unconcealed and for a lawful purpose, without first obtaining a permit. The North Carolina constitutional provision then in effect stated: "The right of the people to keep and bear arms shall not be

infringed;...nothing herein contained shall justify the practice of carrying weapons or prevent the Legislature from enacting penal statutes against said practice."¹⁵⁴ The court found that the statute which the defendant was charged with violating contravened this constitutional provision. A distinction was drawn between the "prohibition " and the mere "regulation" of the right to bear arms, the former constituting an abridgment of the constitution while the latter did not.¹⁵⁵ The court noted that the purpose of the constitutional right was to enable "the people to protect themselves against invasions of their liberties"¹⁵⁶ and to defend "person and property against mobs and violence,"¹⁵⁷ by preserving to the people "the right to acquire and retain a practical knowledge of the use of firearms."¹⁵⁸ Because the statute prohibiting the carrying of an unconcealed weapon without a permit would contravene the purpose of the North Carolina Constitutional provision, it is a "prohibition" of the right to bear arms and is therefore void. Furthermore, the court held, even as a regulation it is void because it is an unreasonable regulation.¹⁵⁹

The distinction drawn between permissible regulations and impermissible prohibitions by the North Carolina Supreme Court is not an uncommon one,¹⁶⁰ but, as in the **Kerner** case, the explanation as to why a particular statute falls within either of the categories is never adequate. The view taken by the Kansas Supreme Court in **Salina** as to its constitutional provision avoids this fragile dichotomy, but in so doing it in effect declares that any state firearm legislation which does not relate to the bearing of arms as a member of an organized state militia or other legal military organization is constitutionally permissible. Although the Kansas court's interpretation goes farther than any other state court in construing its constitutional provision, in practice the provisions of many states have been applied at least as expansively.¹⁶¹ Nevertheless, the **Kerner** and **Salina** cases serve as a reminder of the variation which exists among state constitutional provisions and their judicial interpretations.

IV. Conclusion

In all likelihood, some type of new federal firearm legislation will be enacted in the foreseeable future. When this occurs, there will be a flurry of challenges in the courts to the legislation on the ground that it violates the second amendment, as occurred after Congress enacted the National Firearms Act of

1934 and the Federal Firearms Act of 1938. It is submitted that on the basis of the few cases which have considered the nature and scope of the second amendment and in light of the purposes which the second amendment was intended to further, it is improbable that any type of federal regulation will or should be held by the courts to infringe upon the second amendment.

Nor do most state constitutional provisions, it is submitted, constitute an obstacle to further state firearm regulation. However, the constitutional provisions in some states have on occasion been held to guarantee a more substantial individual right to bear arms, and therefore, state legislation which is more expansive in scope may in particular states be subjected to successful challenges as violative of a "right to bear arms."

Footnotes:

1. **See, e.g.,** United States v. Miller, 307 U.S. 174 (1939); Feller & Gotting, **The Second Amendment: A Second Look**, 61 Nw. U.L. Rev. 46 (1966) [hereinafter cited as Feller & Gotting].
2. **See, e.g.,** United States v. Tot, 131 F.2d 261, 266 (3d Cir. 1942), **rev'd on other grounds**, 319 U.S. 463 (1943); Rohner, **The Right to Bear Arms: A Phenomenon of Constitutional History**, 16 Cath. U.L. Rev. 53, 60 (1966) [hereinafter cited as Rohner].
3. United States v. Cruikshank, 92 U.S. 542 (1876).
4. A. Sutherland, Constitutionalism in America 97098 (1st ed. 1965); E. Pound, The Development of the Constitutional Guarantees of Liberty 83-84 (1957); sources of Our Liberties 303 (Perry & Cooper ed. 1959) [hereinafter cited as Sources]; Feller & Gotting, **supra** note 1, at 47. As an indication of American thought at the time of the enactment of the state and federal constitutional provisions, it is interesting to note that during the Virginia convention called for ratifying the federal constitution in 1788, Patrick Henry referred to the English experience as a reason for including a bill of rights in the federal constitution. 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 316-17 (2ed. J. Elliot ed. 1836 [hereinafter cited as Elliot's Debates]).
5. Weatherup, **Standing Armies and Armed Citizens: An**

Historical Analysis of the Second Amendment, 2 *Hast. Const. L.Q.* 961, 966 (1975) [hereinafter cited as Weatherup]

6. **Id.** at 966-68; **see** D. Wilson, *a History of England* 385-95 (1967) [herein after cited as D. Willson].

7. Weatherup, **supra** note, at 969. For example, one historian describes how Cromwell forcibly dissolved Parliament by sending his musketeers to the House of Commons, compelling its members to file out of the chamber and locking the door behind them. D. Willson, **supra** note 6, at 415.

8. D. Willson, **supra** note 6, at 418; Weatherup, **supra** note 5, at 969.

9. Weatherup, **supra** note 5, at 970.

10. Note, **Constitutional Limitations on Firearms Regulation**, 1969 *Duke L.J.* 792-794.

11. Emery, **The Constitutional Right to Keep and Bear Arms**, 28 *Harv. L. Rev.* 473-474 (1915) [hereinafter cited as Emery].

12. Weatherup, **supra** note 5, at 970.

13. Test Act, 1673, 25 *Car. 2, c. 2*; Parliamentary Test Act, 1678, 30 *Car. 2, Stat. 2*; Weatherup, **supra** note 5, at 970-71.

14. D. Willson, **supra** note 6, at 440.

15. Weatherup, **supra** note 5, at 971-72.

16. **Id.** at 971.

17. **Id.** at 971-72.

18. **Id.** at 972; D. Willson, **supra** note 6, at 441.

19. Weatherup, **supra** note 5, at 972-73.

20. Rohner, **supra** note 2, at 58.

21. Bill of Rights of 1689, 1 *W. & M., sess. 2, c.2*.

22. Weatherup, **supra** note 5, at 973.

23. Bill of Rights of 1689, 1 *W. & M., sess. 2, c.2*, **reprinted in Sources**, **supra** note 4, at 245.

24. Weatherup, **supra** note 5, at 973; **see** Rohner, **supra** note 2, at 59; **see** Feller & Gotting, **supra** note 1, a 48-49.

25. Bill of Rights of 1689, 1 *W. & M., sess. 2, c.2*, reprinted in *Sources*, **supra** note 4 at 246.

26. **See, e.g.**, *Burton v. Sills*, 53 *N.J.* 86, 248 *A.2d* 521 (1968), **appeal dismissed** 394 *U.S.* 812 (1969); *Aymette v. State*, 21 *Tenn.* (2 *Hum.*) 154 (1840).

27. **See e.g.**, Feller & Gotting, **supra** note 1, at 48-49; Haight, **The Right to Keep and Bear Arms, 2 Bill of Rights Rev.** 31, 32-33 (1941) [hereinafter cited as Haight]; Weatherup, **supra** note 5, at 973-74.

28. Haight, **supra** note 27, at 33.

29. **Id.**

30. **See** Note, **The Right to Bear Arms**, 19 S.C.L. Rev. 402, 404 (1967) [hereinafter cited as S.C. Note].

31. R. Rutland, *The Birth of the Bill of Rights 1776-1791*, at 4 (1955) [hereinafter cited as R. Rutland]; Emery, **supra** note 11, at 475; Haight, **supra** note 27, at 33; **see** Rohner, **supra** note 2, at 56-57. For example, during the Virginia ratifying convention of 1788, Patrick Henry referred to the English experience as a reason for including a bill of rights in the federal constitution. Elliot's Debates, **supra** note 4, at 316-17.

32. **See** division II, **supra**.

33. **See** Weatherup, **supra** note 5, at 974. Weatherup points out that the New England when Cromwell came to power. **Id.**

34. R. Rutland, **supra** note 31, at 4.

35. Weatherup, **supra** note 5, at 975.

36. **See Id.** at 975-77. For example, parliament in 1766 enacted the Declaratory act. 6 Geo. 3, c. 12 (1766), which chastised the colonial legislative bodies for enacting measures derogatory to the authority of Parliament and the Crown, declared that the American colonies were subordinate to the King and Parliament, and declared that the King and Parliament had "full Power and Authority to make Laws and Statutes of sufficient Force and Validity to bind the Colonies and People of America...in all Cases whatsoever." Weatherup, **supra** note 5, at 975-76.

37. Rohner, **supra** note 2, at 56.

38. Emery, **supra** note 11, at 475; Weatherup, **supra** note 5, at 977. Evidence of this outrage is found in the writings of the period. For example, Thomas Jefferson decried the use by the King of "large bodies of armed forces" as a means of enforcing his "arbitrary measures," T. Jefferson, *A Summary View of the Rights of British America* (August, 1774), reprinted in *The Complete Jefferson* 17 (S. Padover 1943), and James Wilson wrote that the use of military force was an element in George III's "Plan of reducing the colonies to slavery", J. Wilson, *An Address to the Inhabitants of the Colonies* (February 13, 1766), quoted in Feller & Gotting, **supra** note 1, at 50. Most revealing is that the list of grievances against George III contained in the Preamble to the Declaration of Independence included one which stated that "He has kept among us, in times of peace. Standing Armies without the consent of our Legislatures." Rohner, **supra** note 2, at 56 n. 18.

39. **See** Feller & Gotting, **supra** note 1, at 49-50.
40. **Id.** at 50.
41. **Id.** at 51.
42. **See** Weatherup, **supra** note 5, at 977; **see** Feller & Gotting, **supra** note 1, at 49-51.
43. **See** Weatherup, **supra** note 5, at 977-78.
44. Feller & Gotting, **supra** note 1, at 51-52.
45. **Id.** The strength of the colonists' belief in the militia is evidenced by their resistance to the attempted seizure of militia arms by British soldiers in April 1775 at Lexington. The result was the first important battle of the American Revolution. **Id.** at 52.
46. Emery, **supra** note 11, at 475.
47. Feller & Gotting, **supra** note 1, at 51.
48. Emery, **supra** note 11, at 475; *United States v. Miller*, 307 U.S. 174, 179-82 (1939).
49. Emery, **supra** note 11, at 474-75; Haight, **supra** note 27, at 33.
50. Rohner, **supra** note 2, at 57; Note, **Constitutional Limitations on Firearms Regulation, 1969 Duke L.J. 773, 796 [hereinafter cited as Duke Note]**.
51. Rohner, **supra** note 2, at 57; Duke Note, **supra** note 50, at 796.
52. Rohner, **supra** note 2, at 57.
53. R. Rutland, **supra** note 31, at 124. Robert Allen Rutland presents an excellent account of the Anti-Federalists' use of this issue in their attempt to block ratification of the Constitution by the states and their eventual victory in several of the states in securing the recommendation of amendments in return for ratification. **Id.** at 126-89.
54. R. Rutland, **supra** note 31, at 162.
55. **Id.**
56. **See id.** at 159-66.
57. **Id.** at 171.
58. **Id.** at 174.
59. E. Dumbauld, *The Bill of Rights and What it Means Today* 183-89 (1957) [hereinafter cited as E. Dumbauld].
60. **Id.** at 185.
61. **Id.** at 21.
62. **Id.** at 23. The one proposal which was deleted during Congress' consideration of the amendments would have allowed

conscientious objectors to avoid bearing arms by hiring a substitute. **Id.**

63. **Id.** at n.42; R. Rutland, **supra** note 31, at 206.

64. U.S. Const. art I, ** 8 cl. 16.

65. Elliot's Debates, **supra** note 4, at 385-86.

66. **Id.** at 379.

67. **Id.**

68. **Id.** at 380. These concerns can be discerned from the remarks made by George Mason, an Anti-Federalist leader, at the Virginia convention:

There are various ways of destroying the militia. A standing army may be perpetually established in their stead. I abominate and detest the idea of a government, where there is a standing army. The militia may be here destroyed by that method which has been practised in other parts of the world before; that is, by rendering them useless - by disarming them. Under various pretences, Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them...Should the national government wish to render the militia useless, they may neglect them, and let them perish, in order to have a pretense of establishing a standing army.

...[W]hen once a standing army is established in any country, the people lose their liberty. When, against a regular and disciplined army, yeomanry are the only defence, - yeomanry, unskilled and unarmed, - what chance is there for preserving freedom?...Recollect the history of most nations of the world. What havoc, desolation, and destruction, have been perpetrated by standing armies.

Id. at 379-80.

69. **Id.** at 382.

70. **Id.** at 386-87.

71. **Id.** at 384-88.

72. **See** text accompanying notes 48-49 **supra**.

73. *United States v. Miller*, 307 U.S. 174, 178-79 (1939).

74. **See** Elliot's Debates, **supra** note 4, at 171.

75. E. Dumbauld, **supra** note 59, at 207. The amendment passed by the House of Representatives on August 24, 1789 read:

A well regulated militia, composed of the body of the

People, being the best security of a free State, the right of the People to keep and bear arms, shall not be infringed, but no one religiously scrupulous of bearing arms, shall be compelled to render military service in person.

Id. at 214. The Senate on September 9, 1789, enacted a provision which stated:

A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

Id. at 271. It was the Senate's version which was accepted in the conference committee and presented to the states for ratification. The rephrasing of the proposal by the House and the Senate, except for the Senate's deletion of the clause exempting conscientious objectors from bearing arms in military service, does not appear to have been intended as a change in the substance of the proposed amendment, but instead seems to have been merely the result of stylistic considerations. Feller & Gotting, **supra** note 1, at 62.

76. Feller & Gotting, **supra** note 1, at 61.

77. Mosk, **Gun Control Legislation: Valid and Necessary**, 14 N.Y.L.F. 694, 709 (1968) [hereinafter cited as Mosk]; S.C. Note, **supra** note 30, at 405. This conclusion is further supported by a textual interpretation of Madison's proposal. It is noted that when referring to conscientious objectors, the phrase used by Madison was "no one" and the phrase used in the version adopted by the House of Representatives was "no person." This clearly indicated an intent to apply this provision to individuals. However, when speaking of the right to bear arms, the collective terms "the people" and "the body of the People" were used in the two versions. This contrast in terminology supports the conclusion that while the protection of religious scruples was seen as an individual right the right to bear arms was intended to be a collective one, possessed by the people as a body in the form of a well-armed militia. Mosk, **supra** note 77, at 709; S.C. Note, **supra** note 30, at 402.

78. Feller & Gotting, **supra** note 1, at 62.

79. *United States v. Cruikshank*, 92 U.S., 542, 553 (1876).

80. 92 U.S. 542 (1876).

81. Act of May 31, 1870, ch. 114, ** 6, 16 Stat. 14 (current version at 18 U.S.C. ** 241 (1970)).

82. *United States v. Cruikshank*, 92 U.S. 542, 548 (1876).

83. **Id.** at 553.
84. 116 U.S. 252 (1886).
85. 153 U.S. 535 (1894).
86. 32 U.S. (7 Pet.) 243 (1833).
87. Rohner, **supra** note 2, at 66.
88. **See**, e.g., *Malloy v. Hogan*, 378 U.S. 1 (1964) (fifth amendment privilege against self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (sixth amendment assistance of counsel); *Mapp v. Ohio*, 367 U.S. 643 (1961) (fourth amendment).
89. *Fife v. State*, 31 Ark. 455 (1876); **Ex parte** Ramirez, 193 Cal. 633, 226 P. 914 (1924); *State v. Keet*, 269 Mo. 206, 190 S.W. 573 (1916); *People v. Persce*, 204 N.Y. 397, 97 N.E. 877 (1912); *State v. Kerner*, 181 N.C. 574, 107 S.E. 222 (1921); **Ex parte** Thomas, 21 Okla. 770, 97 P. 260 (1908); *Caswell & Smith v. State*, 148 S.W. 1159 (Tex. Civ. App. 1912).
90. Rohner, **supra** note 2, at 67.
91. **Id.**
92. **Id.**
93. **See** text accompanying notes 101-108 *infra*.
94. Duke Note, **supra** note 50, at 789.
95. 116 U.S. 252 (1886).
96. *Presser v. Illinois*, 116 U.S. 252, 257-58 (1886) (argument of plaintiff-in-error).
97. **Id.** at 265-66 (emphasis added).
98. Duke Note, **supra** note 50, at 791-92.
99. 32 U.S.C. ** 101-716 (1970 & Supp. V 1975).
100. S.C. Note, **supra** note 77, at 409-10.
101. 307 U.S. 174 (1939).
102. National Firearms Act of 1934, ch. 757, 48 Stat. 1236 (1934) (current version at 26 U.S.C. *** 5801-5803 (1970 & Supp. V. 1975)).
103. *United States v. Miller*, 307 U.S. 174, 175 (1939).
104. **Id.** at 178.
105. **Id.**
106. **Id.** at 179-82.
107. **Id.**
108. **Id.** at 178.
109. Feller & Gotting, **supra** note note 1, at 65-66.
110. **Id.**
111. 131 F.2d 916 (1st Cir. 1942), **cert. den. sub nom.**, *Velazquez v. United States*, 319 U.S. 770 (1943).

112. Federal Firearms Act of 1938, ch. 850, 52 Stat. 1250 (repealed 1968).
113. *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942), **cert. den. sub nom.** *Velazquez v. United States*, 319 U.S. 770 (1943).
114. **Id.**
115. **Id.**
116. **Id.**
117. **Id.** at 923.
118. **Id.** Although the court in *Cases* made an independent assessment of the meaning of the second amendment and attempted to elucidate factors which could be employed in determining whether it was violated by federal legislation, it nevertheless implicitly agreed with the Supreme Court's determination in **Miller** that the second amendment was intended to ensure that the state militias would remain well-armed by prohibiting the regulation of weapons which reasonably related to the preservation of a well regulated militia.
119. **See, e.g.,** *United States v. Tomlin*, 454 F.2d 177 (9th Cir.). **cert. den.**, 406 U.S. 924 (1972); *United States v. Williams*, 446 F.2d 486 (5th Cir. 1971); *United States v. McCutcheon*, 446 F.2d 133 (7th Cir. 1971); *United States v. Johnson*, 441 F.2d 1134 (5th Cir. 1971); *United States v. Synnes*, 438 F.2d 764 (8th Cir. 1971), **vacated on other grounds**, 404 U.S. 1009 (1972).
120. 32 U.S.C. ** 106, 701-710 (1970 & Supp. V. 1975).
121. These states are California, Delaware, Illinois, Iowa, Minnesota, Nebraska, Nevada, New Jersey, New York, North Dakota, Virginia, West Virginia and Wisconsin.
122. 53 N.J. 86, 248 A.2d 521 (1968), **appeal dismissed**, 394 U.S. 812 (1969).
123. *Burton v. Sils*, 53 N.J. 86, 90, 248 A.2d 521, 522-23 (1968), **appeal dismissed**, 394 U.S. 812 (1969).
124. **Id.** at 99, 248 A.2d at 528.
125. **Id.** at 92-99, 248 A.2d at 525-28.
126. Mich. Const. art. I, **6.
127. 253 Mich. 537, 235 N.W. 245 (1931).
128. *People v. Brown*, 253 Mich. 537, 540, 235 N.W. 245, 246 (1931).
129. **Id.** at 541, 235 N.W. at 246-47.
130. **Id.** at 541, 235 N.W. at 247.
131. Haight, **supra** note 27, at 41.
132. These states are Colorado, Florida, Georgia, Idaho,

Kentucky, Louisiana, Mississippi, Missouri, Montana, New Mexico, North Carolina, Oklahoma, Tennessee, Texas and Utah.

133. *Morrison v. State*, 339 S.W. 2d 529, 531 (Tex. Crim. App. 1960); *Duke v. State* 42 Tex. 455, 458-59 (1875). In the latter case, the court described the right protected by the Texas provision in this manner:

The arms which every person is secured the right to keep and bear (in the defense of himself or the State, subject to legislative regulation), must be such arms as are commonly kept, according to the customs of the people, and are appropriate for open and manly use in self-defense, as well as such as are proper for the defense of the State.

Id. at 458.

134. Tex. Const. art. I, **23.

135. 12 Ky. (2 Litt.) 90 (1822).

136. *State v. Reid*, 1 Ala. 612 (1840); *State v. Buzzard*, 4 Ark. 18 (1842); *Carlton v. State*, 63 Fla. 1, 58 So. 486 (1912); *Nunn v. State*, 1 Ga. 243 (1846); *McIntire v. State*, 170 Ind. 163, 83 N.E. 1005 (1908); *State v. Keet*, 269 Mo. 206, 190 S.W. 573 (1916); *Porello v. State*, 121 Ohio St. 280, 168 N.E. 135 (1929); **Ex parte** Thomas, 21 Okla. 770, 97 P. 260 (1908); *Wright v. Commonwealth*, 77 Pa. St. 470 (1875); *Aymette v. State*, 21 Tenn. (2 Hum.) 154 (1840).

137. These states are Colorado, Kentucky, Louisiana, Mississippi, Missouri, Montana, New Mexico, North Carolina and Oklahoma.

138. *Feller & Gotting*, **supra** note 1, at 62 n.73.

139. *Bliss v. Commonwealth*, 2 Ky. (Litt.) 90, 91-92 (1822).

140. **See, e.g.**, *Strickland v. State*, 137 Ga. 1,2,72 S.E. 260, 261 (1911) ("This ruling [**Bliss**] has not been followed but severely criticized. The decisions are practically unanimous to the contrary."); *Salina v. Blaksley*, 72 Kan. 230, 231, 83 P. 619, 620 (1905) ("[T]his decision [**Bliss**]... has never been followed.").

141. *Hill v. State*, 53 Ga. 472 (1874); *State v. Wilforth*, 74 Mo. 528 (1881).

142. *Isaiah v. State* 176 Ala. 27, 58 So. 53 (1911).

143. *People v. Wells*, 156 P.2d 979 (Cal. 1945).

144. *Jackson v. State*, 68 So. 2d 850 (Ala. 1953); *People v. Garcia*, 218 P.2d 837 (Cal. 1950); *City of Akron v. Williams*, 177 N.E.2d 802 (Ohio 1960); *State v. Robinson*, 343 P.2d 886 (Ore 1959); *State v. Tully*, 198 Wash. 605, 89 P.2d 517 (1939).

145. *State v. Johnson*, 76 S.C. 39, 56 S.E. 544 (1907); *McCullum*

v. City of Cincinnati, 51 Ohio App. 67, 199 N.E. 603 (1935).

146. Davis v. State, 146 So. 2d 892 (Fla. 1962); Strickland v. State, 137 Ga. 1, 72 S.E. 260 (1911); Matthews v. State, 148 N.E.2d 334 (Ind. 1958); Burton v. Sills, 53 N.J. 86, 248 A.2d 521 (1968), **appeal dismissed**, 394 U.S. 812 (1969).

147. 72 Kan. 230, 83 P. 619 (1905).

148. 181 N.C. 574, 107 S.E. 222 (1921).

149. Kan. Const. Bill of Rights Sect. 4.

150. Salina v. Blaksley, 72 Kan. 230, 232, 83 P.619, 620 (1905).

151. **Id.** at 233, 83 P. at 620.

152. **Id.**; **accord**, State v. Bolin, 200 Kan. 369, 436 P.2d 978 (1968). It is also interesting to note that the Kansas Supreme Court in Salina was of the opinion that the second amendment to the federal constitution had the same meaning as the Kansas provision.

153. 181 N.C. 574, 107 S.E. 222 (1921).

154. N.C. Const. art. I, Sect. 30.

155. State v. Kerner, 181 N.C. 574, 580, 107 S.E. 222, 225 (1921).

156. **Id.** at 578, 107 S.E. at 224.

157. **Id.** at 580, 107 S.E. at 225.

158. **Id.** at 580, 107 S.E. at 225.

159. **Id.** at 581, 107 S.E. at 225.

160. **See, e.g.**, Rinzler v. Carson, 262 So. 2d 661 (Fla. 1972); In re Brickey, 8 Idaho 597, 70 P.609 (1902); Las Vegas v. Moberg, 82 N.M. 626, 485 P.2d 737 (1971).

161. **See e.g.**, McCollum v. City of Cincinnati, 51 Ohio App. 67, 199 N.E. 603 (Ct. App. 1935); Mowels v. State, 152 Tex. Crim. 135, 211 S.W.2d 213 (Crim. App. 1948).

GUN CONTROL LEGISLATION: VALID AND NECESSARY

By Stanley Mosk

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You're all chasing dollars, but there are other people who are chasing dollars to buy guns...We need lawyers today who have a law book in one hand and a gun in the other...so that if he goes to court and that ... doesn't come out right, he can pull out his gun and start shooting.

Eldridge Cleaver, Sept. 1968¹

Don't overlook the potential of .22 long rifles, pistols or rifles, as guerrilla warfare or resistance weapons ... The .22 can be silenced completely with materials that are always available. Although the .22 lacks killing power, this can be readily increased by filling hollow point bullets with poison.

Robert DePugh, Jan. 1966²

It is utterly incomprehensible that the sovereign people of these United States, through Congress, are impotent to act in the face of the dangers to internal peace and security *New York Times* inherent in possession of lethal weapons by the Cleavers and the DePughs, by black revolutionaries and white counter revolutionaries, or by any criminals, ex-convicts, narcotic addicts, alcoholics, minors, aliens, or mentally ill persons.

The need for meaningful gun control legislation is so evident that it seems to me, the burden shifts to the opponents to explain their intransigence. In meeting that burden, the negative adopts this position: the salutary effect of gun legislation on crime control and the possible reduction in violent deaths are outweighed by the inconvenience of registration imposed upon lawful possessors of guns. When their views are stripped of all obscurantism, opponents of controls see the conflict as between lives and inconvenience, and they insist avoiding the latter is more important than saving the former.

There are, said the *Los Angeles Times* in a recent editorial, 7,600 reasons for strong gun laws: the 7,600 murders in which guns were used in 1967, according FBI figures. Guns were also used in 73,000 robberies and 52,000 assaults the same year. J. Edgar Hoover reported that in the past three years the use of guns has gone up 47% in murders, 76% in aggravated assaults, and 58% in armed robberies. It would seem evident that easy accessibility has been, at the very least, a contributing factor.

But, shout bumper stickers in an emotional no sequitur: "When Guns Are Outlawed Only Outlaws Will Have Guns."³Frequently the automobiles with that slogan on the back will have another on the front: "Support Your Local Police."

Former Attorney General Ramsey Clark, who was editorially praised by the for "emerging as a bulwark in Washington against emotionalism,"⁴ in a 23-page letter to the Senate last September 10, said,

[T]hose who stridently call for law and order yet oppose or ignore gun control fail to face the issues, fail to protect the public and raise questions as to their own purposes ... The real question...is not whether gun control legislation can reduce crime and save lives. We know it can ... If we are serious in our professions of concern about crime...then let us move directly against the favored weapon of the lawless - guns.⁵

Some officials saw the need for gun controls long before the recent series of assassinations. Senator Thomas J. Dodd of Connecticut began his valiant efforts to pass meaningful measures in the 88th Congress, and he often referred to "the almost hysterical attempts to kill the legislation."⁶ As the then Attorney General of California, I testified before Senator Dodd's Senate Subcommittee on Juvenile Delinquency in favor of gun controls long before the death of President Kennedy. In recent sessions of Congress there has been a variety of measures other than the Dodd bills.

To say that no more gun laws are needed is to say that all our problems with firearms are singularly unchanging. This is patently untrue. There are many constantly changing aspects of the firearms problem which were never considered when existing laws were drafted. These are facets of the situation which are just now receiving some attention.

Undoubtedly a person who is determined to kill and who cannot readily acquire a firearm can achieve his purpose with a number of substitutes: an axe, a razor, a broken bottle, or various blunt instruments. But the fact remains, a gun embodies a potential for lethal damage that is swifter, more certain, more widespread, more adaptable.

The new problem begins with the availability of cheap foreign firearms which have been flooding the United States. These are primarily surplus from all wars of the last fifty years. They enable dealers to sell for a few dollars weapons which are totally useless for any legitimate hunting or shooting purpose.

Following the advent of this vast tide of cheap weapons, there grew the lucrative business of mail order gun sales - an enterprise which radically changed the entire firearms business in the United States. No longer do local police and local gun dealers know who are buying weapons.

Compounding these two new aspects of the firearms problem is the development of new weapons and their public availability. When most of our current gun laws were drafted, special controls were applied to machine guns, sawed-off shotguns, and tear-gas weapons which had proved particularly dangerous in the hands of Prohibition-era gangsters. Today we are faced with refined weapons: sawed-off rifles, anti-tank guns, mortars, rocket guns and dart guns, and there are certain to be constantly newer technological advances in the macabre art of weaponry. The rocket gun theory is based on the use of a tiny self-propelled rocket which can be fired from virtually any proper size tube. It is a

weapon so new that its full potential has yet to be explored.⁷

The dart gun can shoot tranquilizer darts, explosive charges, and even dye pellets. It is the sort of weapon which is not believed when seen on a TV spy thriller. Yet these weapons are now, today, available to the public.

Nevertheless, there are those who insist we need no new gun laws. Attorney General Thomas C. Lynch of California compares them to those who believe that the securities laws of 1925 are sufficient for today's economy.⁸

The gunfight at O.K. Corral may have been as acceptable a social phenomenon in its day as the St. Valentine's Day massacre was understandable in the Capone era. But this is the final third of the twentieth century. The vast majority of Americans now live in a complex urban society which has changed markedly in the past two decades since the close of World War II.

All the populous states of the nation now have urban complexes, at least one megalopolis, in which tens or hundreds of thousands of people are jammed into high rise buildings or into single-family residences within a confined geographic area. There is no open space, no "country" in the traditional sense, just mile upon mile of dwellings.

In such a structured urban society which requires new approaches and new laws in every field, the wanton misuse and abuse of firearms presents unique problems - vexing problems that remain unsolved today. We cannot indefinitely accept violence, or the means of inflicting acts of violence as a product of this society.

For reasons which escape the author, gun control legislation appears to be a subject that defies objectivity. Laws to regulate automobiles, hospitals, business enterprises, the stock market, cancer treatments, air and water pollution, are considered in a relatively rational manner. Yet, when firearms become the topic for legislative discussion, an observer gets the impression that a license on mothers or apple pie has been proposed. A state law enforcement official recently decried the well-meaning citizens who "seem bitterly determined to confuse patriotism with armed paranoia ... If they weren't armed, they might be funny. But they are armed and they must be regulated."⁹ Another prominent prosecutor made this trenchant comment: "Show me a man who is unwilling to have his gun registered and I will show you a man who should not have a gun."¹⁰

Opponents of controls weep for the protector of the home. They retain visions of the romantic past, when men were men and survival depended upon ability to handle a gun. Yet few people of this generation are likely to come face to face with a coyote in their back yard; A gun for protection against predatory animals is as necessary today to nine-tenths of our population as whiskey is to the drunk for an antidote to snake bite.

The fact is, sportsmen and hunters are generally not the unyielding opponents of controls. They are good citizens amenable to reason. The unreasoning emotional opposition comes from the self-appointed guardians of internal security, the potential vigilantes, the boys down at the pool hall, those who distrust law enforcement agencies and who have a psychotic fear of an impending Communist takeover which they are girding to resist by guerrilla warfare. And, let's face it, city riots and racial violence have created new fears that impel a desire

among individuals to acquire guns, generally to maintain the neighborhood status quo.

While it cannot be a source of pride, unquestionably guns and violence have been an integral part of American life. Hunters make out a case for the need to kill deer for, they say, the natural enemies of deer have become so decimated that were it not for the annual slaughter - euphemistically called a "harvest" - the deer overpopulation could become a serious menace to farm products. To many rural poor, the killing of animals is an essential for protein diet and, indeed, for actual existence. Target shooting is an Olympic sport, the teams generally developed by the wealthy and the military establishments; significantly, the USA and the USSR usually dominate the winners' circle.

To some people rifles are considered a household item, as necessary as pots and pans, and a salutary source of achieving togetherness between father and son. Indeed, along with electric can openers, do-it-yourself outfits, gas ranges, washing detergents and deodorants, Consumers' Union has issued a report on the "twenty-two."

No one who watches television can be oblivious to the deplorable stream of violence consistently brought into the living room. A survey made by the staff of the Christian Science Monitor completed six weeks after the assassination of Senator Robert F. Kennedy showed 84 killings portrayed in 85 1/2 hours of programming over a seven-day period during prime evening and Saturday morning time. During that same period 372 acts or threats of violence were shown, including 162 on Saturday morning when children audiences are larger.¹¹

Unquestionably generations of young Americans have been part of a milieu in which possession and use of guns have been considered acceptable and even desirable. Today we must determine whether society can continue to exist as we have known it if access to lethal weapons is uncontrolled. The question is the simple one I suggested in my opening paragraphs: may criminal, ex-convicts, narcotic addicts, alcoholics, minor, aliens and mentally ill persons have an unchecked and absolute right to possess firearms or may society protect itself by enacting reasonable controls?

Contrary to emotional opposition, the object of legislative proposals is not to outlaw guns. The goal of firearms legislation is not the elimination of all privately-held weapons. The lawful uses of firearms appear to make such a drastic step unwarranted, even assuming it were politically possible. Legislative proposals undertake to identify the types of weapons which have no proper use in private hands and the classes of persons who, because of immaturity, mental or emotional instability, or antisocial behavior, should be denied access to firearms. The difficult residual problem, left to the enforcement authorities, is to ascertain which individuals belong in these classes. But, because the consequences of the unlawful use of firearms are so severe, it is unwise to delay sanctions until after use; rather, this is a particularly appropriate area for preventive measures. Any restrictions on possession necessarily will inconvenience to some extent those who abide by them, but strict regulation will hopefully be of significant effect in limiting availability of weapons to those willing to accept the responsibilities of ownership.

The most frequently expressed rationale for opposition to gun controls is

the second amendment to the Constitution of the United States. I shall therefore turn to that subject.

CONSTITUTIONAL CONSIDERATIONS

Federal control of firearms is limited by the second amendment, which provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."¹² However, this provision has been interpreted as protecting only the right of the states to maintain and equip a militia and not as guaranteeing to individuals the right to bear arms.¹³ Thus, the Supreme Court has held that unless a defendant could show that his possession of a firearm in violation of federal statutes had "some reasonable relationship to the preservation or efficiency of a well regulated militia,"¹⁴ he could not challenge the statute on second amendment grounds.¹⁵ On this reasoning, both the Federal and the National Firearms Acts have been upheld against a series of constitutional challenges.¹⁶ Since I am writing prior to adjournment of Congress, and the form and outcome of proposed federal legislation is as yet unknown, I cannot comment on the most recent specific enactments. However, it seems highly unlikely that reforms similar in principle to existing federal laws would fail to pass constitutional test.

While almost half the states guarantee specifically the right of citizens to bear arms in defense of self or home,¹⁷ it seems unlikely that any new laws would operate to deprive states of their police power to regulate the sale of dangerous weapons.¹⁸ Although a stringent regulation such as the Massachusetts law requiring a showing of need before an individual may purchase a handgun might be invalidated under some state constitutional provisions, laws denying deadly weapons to individuals who have demonstrated a propensity toward violence should not be held unconstitutional.

For at least three decades, the Attorney General of the United States has consistently taken the position that there is no constitutional objection to gun control legislation and no court has rejected his conclusion. In 1934, he advised the House Committee on Ways and Means that the second amendment was no bar to the then proposed National Firearms Act being enacted under the power of Congress to lay and collect taxes and to regulate interstate commerce.¹⁹ That Congress had no doubts about the inapplicability of the second amendment is indicated by omission of any mention of the issue in connection with hearings on the Firearms Act of 1938,²⁰ and the committee reports in connection with the Act.²¹

In subsequent prosecutions under both the 1934 and 1938 acts, defendants raised the contention that the second amendment inhibits federal regulations of firearms, and in not one reported case was a constitutional bar found to exist.

The National Firearms Act of 1934²² levied taxes on dealers, manufacturers and importers of defined firearms and on transfers of such firearms, and required that every person possessing any such firearm not acquired from a registered manufacturer or dealer or importer must register with the Treasury Department his and the weapon's identification. Each non-dealer transfer of such a firearm was

to be accompanied by a written order with an internal revenue stamp affixed.

In an early prosecution under this act, the court in *United States v. Adams*²³ held that the second amendment had no application to the Act, in that the Constitution "refers to the militia, a protective force of government' to the collective body and not individual rights." Next came a unanimous Supreme Court 1939 decision in *United States v. Miller*,²⁴ upholding the conviction of two men who transported in interstate commerce a shotgun which came within the definition of a "firearm" under the National Firearms Act and was not registered as required by the Act. The Court decided that the second amendment did not guarantee the right to keep and bear any weapon not having a "reasonable relationship to the preservation or efficiency of a well regulated militia." The court noted that the obvious purpose of the amendment was to assure the continuation and render possible the effectiveness of the militia subject to call and organization by Congress under Article I section 8, clauses 15 and 16 of the Constitution and that the amendment must be so interpreted.

At the time the Constitution was drafted, the Court indicated, the militia was considered to be a "body of citizens enrolled for military discipline" and that "ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."

If there were any implication in **Miller** that the more practicable a weapon might be for purposes of a well-regulated militia the less subject it might be to Congressional regulation, it was dissipated in the two 1942 Circuit Court holding which the Supreme Court did not disturb: **Cases v. United States**²⁵ and **United States v. Tot**.²⁶ Both cases upheld convictions under the since repealed Federal Firearms Act of 1938,²⁷ specifically section 902(f) making it unlawful for any person convicted of a crime of violence to receive firearms or ammunition transported in interstate or foreign commerce.

In the **Tot** decision the court held that it was abundantly clear from the discussions of the second amendment contemporaneous with its proposal and adoption that unlike the first amendment, it "was not adopted with individual rights in mind, but as a protection for the States in the maintenance of their militia organizations against possible encroachments by the federal power." It further reminded us that "weapon bearing was never treated as anything like an absolute right by the common law" but was regulated by statute as far back as the Statute of Northampton in 1328. Thus the court concluded that the federal statute providing a general regulation of interstate and foreign commerce in firearms was consistent with the history of the second amendment and of the common law proceeding it. The court affirmed the lower court decision,²⁸ which had cited with approval the **Adams** language that the amendment referred to a collective protective force and not to individual rights.

In the **Cases** decision the First Circuit also determined that the right to keep and bear arms "is not a right conferred upon the people by the federal constitution," and that the framers of the amendment did not intend to give private individuals a right to possess deadly weapons of any character, whether or not they were of the kind that would be useful to a well-regulated militia. Specifically, the court held possession of ammunition not to be constitutionally protected.

Because the second amendment refers to "the right of the people to keep and bear arms" it is sometimes argued that this concept impedes restrictive legislation despite the second amendment relation to the organized militia. This theory maintains that while the Constitution cannot be said to be the source of a right to keep and bear arms, its wording indicates that a preexisting right was recognized. Admittedly there are some court decisions, both state and federal, which assume without analysis that the right to bear arms exist in the people as individuals as a natural right or by virtue of common-law heritage.

In that connection it must be realized that "arms" is traditionally a military term and the statement of the right in the federal Constitution is connected with the necessity for a well-regulated militia. therefore, if such a right is personal in nature, it is at least restricted to members of a well-regulated or organized state militia. An early Texas case pointed out that "The word 'arms' in the connection we find it in the Constitution of the United States, refers to the arms of a militiaman or soldier, and the word is used in its military sense."²⁹

While a few older state cases, one as far back as 1822,³⁰ indicate that all citizens had an inviolate right to bear arms for self as well as militia purposes and that a statute prohibiting the carrying of concealed weapons offended the second amendment, that point of view has long been virtually extinct. The Supreme Court stated as an axiom in 1897 that the second amendment "is not infringed by laws prohibiting the carrying of concealed weapons,"³¹ and today the overwhelming majority of state cases follow the doctrine expressed by the Supreme Court of Massachusetts,³² that "it has been almost universally held that the legislature may regulate and limit the mode of carrying arms."Therefore, a state statute regulating, and in certain instances prohibiting, the carrying of enumerated deadly weapons is not repugnant to the second amendment or its counterpart in the constitutions of the several states'.³³And very early acts prohibiting the carrying of revolvers without a license were upheld, as were state laws forbidding possession of concealed weapons.³⁴ It is now clear that no body of citizens other than the organized state militia, or other military organization provided for by law, may be said to have a constitutional right to bear arms.³⁵

The modern tendency among courts and legal writers is to regard the right to bear arms as existing in narrowly limited circumstances. The present state of the law concedes at the most that "the Second Amendment only forbids Congress so to disarm citizens as to prevent them from functioning as state militiamen."³⁶ It follows that any act which does not in fact prevent an eligible citizen from functioning as a state militiaman is not proscribed by the second amendment.

There is also abundant authority indicating that the reference to "the people" in the second amendment means, not individuals, but the body politic. In 1840, a Tennessee court declared, "The single individual...is not spoken of or thought of as 'bearing arms.'"³⁷ The leading case is **City of Salina v. Blaksley**,³⁸ decided in 1905, in which the Court appeared "expressly to decide that the word 'people' means only the collective body and the individual rights are not protected by the constitutional clause."³⁹

The progenitor of the second amendment is generally conceded to be the provision in the English Declaration of Rights of 1688 that "the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law." As noted by Professor Ralph Rohner,⁴⁰ the declaration drafted by Parliament in 1688

[A]ddressed itself to all the grievances prevailing at the time, and so in that sense is similar to our own Declaration of Independence and Constitution. And those grievances were felt so fundamental that the remedies demanded were, even at the time, recognized as basic rights, and included the right to petition for redress and a prohibition against standing armies.⁴¹

Rohner finds it politically significant that the Bill of Rights gave to Protestants the right to bear arms, for historically Protestants had been deprived of weapons "at the same time when Papists were armed"; thus the new guarantee related to a political grievance. Rohner concluded that Parliament did not appear to be claiming for the people a right of individual self-defense or self-effacement, but rather the general right, as a populace, to remain armed in the face of possible military impositions.

Since a specific "right to bear arms" had not manifested itself in any other constitutional schemes,⁴² it seems a peculiar Anglo-American phenomenon. Nowhere is there any respectable authority for the proposition that, as of 1791, a guarantee of the right to bear arms extended generally to personal self-defense as that concept was applied in either the common law or in any constitutional system.

If we try to pursue the common law prior to 1688, we find no evidence that the right to keep and bear arms had achieved any accepted status. To the contrary, there were weapons regulations in England as early as the seventh century. IN 1328, during the reign of Edward III, Parliament enacted the Statue of Northampton, which established the statutory misdemeanor of "going about armed."⁴³

Blackstone, writing in the 1750's, cited the forest and game laws in the British Code as evidence that any observer "will readily perceive that the right of keeping arms is effectually taken away from the people of England."⁴⁴

From a reading of English statutes and related history one must conclude that "a right to keep and bear arms was not regarded as a fundamental right of every Englishman."⁴⁵ Or if any such right existed, Joseph Story noted in 1833, the English right to bear arms was "more nominal than real."⁴⁶

Regardless of the mandate of the English Bill of Rights, England today has stringent regulations on firearms. (see, e.g., Gun License Act of 1870, the Pistols Act of 1903, and the Firearms Act of 1937.)

Professor Rohner draws from this the conclusion that the earliest right to bear arms in Anglo-American jurisprudence:

[w]as penned in an age, and by men, a well-knowing that there were

inherent limitations on such a right - limitations properly derived from the essential police power of their government...The right to bear arms, therefore, was established as a 'fundamental principle' by nations well aware of the parallel principle of police power - i.e., the protection of the public health, safety, and welfare.⁴⁷

ENGLISH FIREARM CONTROLS TODAY

The effectiveness of restrictive firearms legislation may be measured with reasonable accuracy in England, a country with a relatively small land area and uniform national law. The Firearms Act of 1937⁴⁸ requires that a permit, issued by the local police chief and effective for three years, be obtained before the purchase of handguns. The applicant must demonstrate a "good reason" to have the gun and that his ownership would create no "danger to the public safety or to the peace." "Good reason" is interpreted to mean only sporting uses; licenses are not issued for self-defense or property protection, even in the case of persons such as bankguards.⁴⁹ Although a 1965 amendment,⁵⁰ increasing penalties for carrying firearms, was prepared and passed as an emergency measure to stop a crime wave, Britain has had a remarkably minor firearms problem. The city of London reported 172 indictable offenses in which firearms were used during the year of 1964, while there were only 731 such firearms-connected offenses in all of England.⁵¹ In the same year most major American cities numbered arrests for dangerous weapons violations in the thousands.⁵² While many circumstances have undoubtedly contributed to the British success, the gun control laws are a significant factor.

Britain does, however, have some problems. There is some evidence that illegal ownership of firearms does exist, for during a recent two-month amnesty period 7,812 illegally owned weapons were surrendered.⁵³ However, the British experience seems clearly to indicate that restrictive firearms legislation can be effective⁵⁴ without denying sportsmen their weapons.⁵⁵

AMERICAN ORIGINS OF THE SECOND AMENDMENT

The second amendment originated in the first session of the First Congress. As initially introduced by James Madison, it read:

The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.⁵⁶

As reported out of committee, the text had been altered as follows:

A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms.⁵⁷

It should be noted that when referring to conscientious objectors, the phrase used was "no person," thus indicating a clear intent to apply to individuals. But in referring to the right to bear arms, a collective term, "the people," was employed. The contrast in terminology supports the view adopted by historians that the right to bear arms was considered in terms of a collective right, while the protection of religious scruples was to be applied to individuals.

Unfortunately the original debates in the Senate of the First Congress were not reported. In the House, debates were confined to the question of the retention of the conscientious-objector provision, where Elbridge Gerry of Massachusetts did comment briefly on the history of the proposal. He noted that the Crown had quartered troops in Massachusetts and had forbidden the organization of a colonial militia. He said the purpose of organizing and maintaining a militia was to prevent the establishment of standing armies - "the bane of liberty."⁵⁸ He expressed the view that if states were not permitted to make their own choice with respect to conscientious objectors, they might be unable to raise a militia, and the consequence of this would be the development of a standing army. His concern was the weakening of state militias. There was no mention of any individual "right" to bear arms, by Gerry or anyone else, during the course of the debates.

The Annals do not reveal how the final language of the second amendment was resolved. While the entire religious scruple clause was omitted, the final version regarding militia and arms retains the use of the collective term "the people." Thus it seems clear that the second amendment was designed to protect and preserve the state militias. No mention was made of any individual "right" to possess, carry, or use arms, and there is no historical indication of any concern with such a right.

This conclusion is fortified when one analyzes the various provisions in state constitutions in effect in 1791, when the Bill of Rights was ratified. There were then fourteen states in the Union, most of which had adopted constitutions or declarations of rights following the signing of the Declaration of Independence. Rhode Island alone was still operating under its Charter of 1663. That charter authorized the colony to organize and maintain a militia, but it contained no mention of any "right" to bear arms.

Delaware and New Jersey had both adopted constitutions in 1776, but neither contained a bill of rights and there was no mention of a "right" to bear arms. Connecticut had declaration of rights adopted in 1776, but it was also silent with respect to bearing arms.

Five states had constitutions specifically providing for the organization and maintenance of a militia but making no reference to bearing arms. The Georgia Constitution of 1777 was concerned with the structure and regulation of the militia.⁵⁹ The South Carolina Constitution of 1778 merely provided that the militia should be subordinate to the civil authorities,⁶⁰ Maryland and New Hampshire had very similar provisions relating only to the necessity and purpose of the militia.⁶¹ New York apparently did not contemplate a self-armed militia since the Constitution of 1777 required the state to maintain a militia in both war and peace and to maintain a proper magazine of warlike stores," at state expense, for the use

of the militia.⁶²

Three states expressly recognized the "right of the people to bear arms" *for the defense of the state*. The Massachusetts Constitution of 1780 provided: "The people have a right to keep and to bear arms for the common defense."⁶³ The North Carolina Constitution of 1776 stated: "That the people have a right to bear arms, for the defence of the State..." and the remainder of the article forbade maintenance of a standing army and insured civilian control over the militia.⁶⁴ Both these constitutions consistently used the term "people" in referring to collective rights, such as the right of self-government. Where individual rights were guaranteed, the terms "men," "individuals," "persons," "citizens," or "subjects" were used. The Virginia Bill of Rights of 1776 provided: "That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural and safe defence of a free State..."⁶⁵

If an individual right to bear arms for private purposes was recognized in these states in 1789, it was not indicated or specifically guaranteed by the state constitutions or charters. On the other hand, the right to maintain a militia for the defense of the state was zealously guarded. It seems apparent that federal imposition upon the militia concerned these states when the First Congress assembled, rather than protection of any existing individual right to bear arms.

A contrary contention may be arguably justified from only two state constitutions. The Pennsylvania Constitution of 1776 provided: "That the people have a right to bear arms for the defence of themselves and the state..."⁶⁶ However, the remainder of that article was concerned with the prohibition against a standing army and the guarantee of civilian control of the militia. Moreover, "people" seems to have been employed in a collective sense throughout the Constitution and other expressions were used to indicate individual rights. I would conclude that the article was intended to refer only to the common defense, not to individual self-defense. And finally, the Vermont Constitution of 1777 provided: "The people have a right to bear arms for the defence of themselves and the State." Since the relevant sections of the article also prohibited a standing army and required civilian control of the militia, I find it reasonable to conclude that the phrase "defence of them" referred only to collective defense and did not encompass individual self-defense.⁶⁷

The state constitutions were undoubtedly a mirror of the concerns of the people and their representatives when the First Congress met and considered the Bill of Rights. At that time the states indicated no manifest determination to protect any individual "right" to own, carry or use firearms for private purposes. If such a "right" existed, it was certainly not clearly expressed. Both the states and the Congress were preoccupied with the distrust of standing armies and the desirability of preserving state militias. It was in this context that the second amendment was written.

CONSTITUTIONS OF THE STATES TODAY

The American Bar Foundation study of firearms regulations (Nov. 6, 1967) found that the constitutions of 35 states guarantee the right to bear arms.⁶⁸ Three

states exactly reproduce the terms of the second amendment; two others repeat its words with additions. The second amendment protects a right to "keep and bear arms," which would appear to be a greater right than that of merely "bearing arms." Including those five states that closely or completely follow the federal provision, that are seventeen states that guarantee the right to "keep and bear arms."⁶⁹

While the state constitutional provisions are broadly similar to that of the second amendment, there are significant variations. The right to bear arms is stated as adhering to "the people" or "the citizens" in 22 states and only in 13 instances to the individual, including Kentucky, which uses the phrase "all men." In no state is the right formulated as one attaching unqualifiedly to individuals; all the guarantee provisions refer in one way or another to the concept of defense of self and the state, or the maintenance of a militia. Rhode island has what is probably the broadest provision - "The right of the people to keep and bear arms shall not be infringed." Nevertheless, it appears that since the word "people" is used, the right accrues only to citizens acting in concert.

The right to bear arms is associated with concepts of a self-defense or defense of the state in 28 constitutions. Four of the states use the phrase "common defense," indicating that the right of individual self-defense is not contemplated. In 12 states the individual right to bear arms appears to be linked to the individual right of self-defense as well as to the right of defending the state. Two state constitutions expressly declare that the right to bear arms shall not justify the organization of bodies of armed men.

The American Bar found that the experience of Kentucky illustrates the reason why some state constitutions reserve the right of the legislature to regulate the carrying of weapons. The Supreme Court of that state struck down a law to prevent the carrying of concealed weapons as violating the constitutional provision that "the right of the citizens to bear arms in defense of themselves and the state shall not be questioned."⁷⁰ The Kentucky Constitution was subsequently amended by the addition of these words, "but the general assembly may pass laws to prevent persons from carrying concealed arms."⁷¹

At present, eight states reserve to their legislatures the right to prevent the carrying of concealed weapons, and seven reserve the broader right to regulate the manner of carrying or bearing arms. In the other states laws regulating the carrying of certain kinds of firearms or carrying them under certain circumstances have been held valid.⁷² Some courts have held, even in the absence of a specific power reserved by the state constitution, that legislatures may subject the right to bear arms to reasonable regulation.⁷³ Others have held that "arms" does not include the type of weapon the questioned enactment seeks to regulate.⁷⁴

GUNS AND CRIME CONTROL

The American Bar Foundation in a report published in 1967 on "Firearms and Legislative Regulation" reached this conclusion:

It does not follow, however, that because firearms may not cause

crimes that their widespread availability does not aggravate criminal conduct when it occurs. If many or most assaultive crimes, including homicide, are committed with the "weapon at hand," then general ready accessibility of guns increases the likelihood that guns rather than other weapons will be used. And it seems hardly disputable that guns produce more effective injuries than other weapons - as the equipment of modern armies attest. If firearms regulation is seen as a device for crime *control* - reduction in the seriousness of crime - rather than simply a device for crime *prevention*, the case for regulation is clearly a strong one. In this perspective, it seems irrelevant that firearms control may not have the effect of reducing the number of crimes, if it contributes to reduction in their seriousness.

While law enforcement officers express the belief that gun control laws would reduce the number of criminal homicides, opponents of controls insist that the killer is crucial, the weapon only an incidental means. As Wolfgang put that point of view:

Few homicides due to shootings could be avoided merely if a firearm was not immediately present, [for] the offender would select some other weapon to achieve the same destructive goal.⁷⁵

The most thorough analysis of this subject was published recently by Frank Zimring, professor of law, and a research associate in the Center for Studies in Criminal Justice at the University of Chicago Law School. Based upon a study of more than 1,400 homicides and 22,000 assaults during 1965, 1966, and 1967 in Chicago, Zimring concluded that gun controls would effectively prevent a considerable number of fatalities.

Reduced to a simple syllogism, the findings statistically demonstrate:

1. A substantial proportion of killings appears to result from attacks that were not made with the single-minded intent to kill.

2. The gun and the knife are interchangeable weapons for persons who make such attacks.

3. Whenever knives are used, the fatality rate from serious attacks is less than one-fifth as great as that from gun attacks.

Thus, if firearms were eliminated, knives would be the next most dangerous probable substitute - but knives are demonstrably less likely than guns to be lethal in attack results.

That the vast majority of homicides occur because of an ambiguous intention, rather than a single-minded intention to kill, is indicated by Zimring's study which established that 82% of the homicides occurred as a result of heated altercation.

In Zimring's study, 52% of the homicides were committed with firearms, 30% with knives, 8% with other weapons and 10% with no weapon. In general, the same kinds of altercations produced gun and knife killings.⁷⁸

Other conclusions of the study were these:

Seventy percent of all gun homicides resulted from a single wound, although a "single-minded intention to kill" should prompt the attacker to insure his result by multiple wounding. Furthermore, there is evidence that, at least for those attackers who have no single-minded intention to kill, the knife and the gun are largely interchangeable weapons.

Assault figures show that just as many knife wounds are located in the vital areas of the body (head, neck, chest, back, abdomen) as are gun wounds.

Assault data also show that knife attacks result, if anything, in more multiple woundings than gun attacks.

Yet there are between five and six times as many fatalities per 100 gun attacks as there are per 100 knife attacks.⁷⁹

Thus, although some opponents of control insist the number of homicides. According to the FBI Annual Uniform Crime Reports for 1967,⁸¹ firearms were used in 63% of all 1967 murders. Seventy-six policemen were killed by criminals in 1967. This was 19 more than in 1966, and well above the annual average of 48. firearms were used in all but five of last year's police killings.

During the period 1962 through 1967, the FBI report showed, there were 59,015 murders. Fifty-eight percent were gun murders.

Four northeastern states with strict gun control laws had the lowest incidence of murder by firearms: Rhode Island, 34.1%; New York, 34.9; Massachusetts, 39.9; and New Jersey, 41.2.

Texas, without gun control laws, recorded the highest number of homicides - (5,104) - of which 70% were gun deaths. This compared with more populous New York State which, with the country's most stringent firearms controls, had 4,835 murders, of which 34.9% were the result of the use of guns.

Statistics for cities are comparable. Boston and New York City report 2.8 and 6.1 murders respectively per 1000,000 inhabitants, while Atlanta - in Georgia, a state with few gun controls - and Dallas have 11.5 and 10.3 gun murders per 100,000. While other factors may contribute to these results, the value of firearms regulations seems clear.⁸²

CONCLUSION

The public was aroused to the dangers inherent in mail-order sale of weapons after the Warren Commission established that Lee Harvey Oswald, using a fictitious name and post-office box, purchased by mail the Mannlicher-Carcano rifle that killed President Kennedy.⁸³ Time dimmed memories and diluted legislative enthusiasm. The murder of Dr. Martin Luther King, Nobel Peace Prize winner and the eloquent voice of nonviolence in our society, again stirred the conscience of America - but only momentarily. As if to prove the specter of violent death is still unchecked, Senator Robert F. Kennedy was slain this past June, in the midst of a presidential campaign. Public opinion polls indicated an overwhelming demand for legislative action.

Concerned Americans are entitled to ask how long they must suffer the kind of violence that snuffed out the lives of President Kennedy, Medgar Evers, Malcolm X, Dr. King, Senator Kennedy - and 7,600 others annually. The possibility

that many, or most of that number might die in some other manner if guns were unavailable is no rebuttal to the charge that we now make it unconsciously easy for those who are violence-prone. That criminals will find some way to get lethal weapons despite controls justifies inaction about as much as a suggestion that we maintain no drug controls because willful people will always find ways of obtaining illicit drugs. That law-abiding citizens who desire guns will be inconvenienced by controls is as unconvincing as the complaint of the careful motorist who is required by law to carry liability insurance.

In short, action in the field of gun controls is long overdue. We can hope no more assassinations occur before Congress and state legislatures respond, not perfunctorily, but effectively.

Footnotes:

1. Eldridge Cleaver, so-called "minister of Information" for the Black Panthers and presidential nominee of the Peace and Freedom Party, was invited to address the Barristers Club of San Francisco, a respected group of young lawyers. His remarks were reported in Newsweek Magazine, Sept. 16, 1968, at 30.

2. The quotation is from the Minutemen Bulletin of January 1966. Robert DePugh is the leader of the Minutemen, an organization with headquarters in Narbonne, Mo., and branches purportedly throughout the country. The Minutemen, who drill in private and secrete caches of weapons and ammunition to use against their fancied imminent communist takeover, have a political arm known as the Patriotic Party. Its number one project has been to oppose all gun control legislation.

3. A close approximation of that theme was sounded by George C. Wallace in Dallas on Sept. 16, 1968: "if guns are taken away on the national scene, every Texan would have his guns taken away and every thug here would have ten guns." (Los Angeles Times, Sept. 17, 1968.)

4. N.Y. Times, Sept. 20, 1968, at 46, col. 1.

5. N.Y. Times, Sept. 11, 1968, at 19, col. 1.

6. Address by Senator Thomas J. Dodd, Americana Hotel, New York, Aug. 12, 1964. He pointed out some of the evils of mail-order gun sales:

25 per cent of the 200 consignees investigated had records of arrest with the Metropolitan Police Department ranging in seriousness from misdemeanors to such felonies as assaults with dangerous weapons, assaults on police officers, narcotic violations and homicide.

At the time of our study, the five police precincts which had the highest incidences of "mail-order" gun deliveries also had the five highest crime rates in the metropolitan area.

Each month brings fresh evidence of the nature of the mail-order traffic. For example, just last month, the Chicago Police Department submitted a report to me covering the activities of Weapons, Inc., a mail-order firm in Culver City, California.

Briefly, this firm sold 2,630 weapons to 1,257 persons during the 3-year period 1960-63. Of this number, 322, or 25 per cent, had criminal records with the Chicago Police Department. While Chicago requires a permit to carry a gun, 2,528 of these weapons were not registered with the Chicago Police Department.

This is just another instance of how local law is circumvented by the mail-order gun business and a good illustration of the need for additional Federal regulations.

7. The testimony of Attorney General Lynch before a California legislative committee, November 5, 1965, is frightening:

The same means of propulsion that gives us the capacity to put men into space are now being used to create weapons...We are faced now with a revolution in weaponry. I can tell you that the potential for misuse by criminal elements is unlimited.

A new weapon using the rocket principle is being produced and marketed in California,...not [by] an established gun manufacturer, but rather [by] a firm which is principally engaged in space-age research. The men who conceived this rocket gun have been associated with such developments as the Manhattan Project...This weapon fires small rockets at high velocities. The basic scientific difference of this gun from conventional firearms is that the firing device itself is merely a launching tube ... it has been estimated that a basic launching device for these rockets could be constructed for as little as 87 cents.

This new weapon, and all weapons like it, depend on the projectile itself both for propelling power and accuracy.

It basically represents rocketry - miniature rocketry

[N]ow that we have entered the stage of hand rocketry, we must face the fact that "bigger and better" rockets for all types of firearms are likely to be developed. Continued experimentation and development seem inevitable. And from such research will come devices which will completely outclass the heavy-duty weapons presently used by law enforcement.

A gun expert, writing about the rocket gun, recently stated that the age of gun powder as we know it today will soon be a thing of the past. "Today's high velocity rifles and pistols will be as obsolete as the flintlock and will become collector items," he observed.

In my opinion, we should give careful consideration before making these new weapons readily accessible to any person. It is unthinkable that they be placed in the hands of the criminal, subversive or radical elements. We have been given warning of the weapons which are feasible. Forewarned, there can be no excuse for laxity in controls.

8. Address by Attorney General Thomas C. Lynch, Beverly Hills, California, Sept. 28, 1966.

9. Chief Deputy Attorney General Charles A. O'Brien of California, testifying before a California legislative committee in Sacramento, May 2, 1967.

A Cincinnati psychologist, Dr. Karl Heiser, expressed an opinion that there were "about 10,000 psycho gun addicts" in his community. He said many sexually inadequate men drive fast, powerful cars "to make them feel sexually potent while others use guns as sex symbols." (Los Angeles Times, Aug. 22, 1968).

10. Chief Assistant District Attorney Frederick J. Ludwig, Queens County, New York, testifying before the United States Senate Subcommittee on Juvenile Delinquency. Washington, July 11, 1967.

11. The Christian Science Monitor Survey was reported in the N.Y. Times, July 26, 1968, at 35, col. 1. The study found the most violent evening hours were between 7:30 and 9, when according to official network estimates, 26.7 million children between the ages of 2 and 17 are watching television:

In those early evening hours, violent incidents occurred on an average of once every 16.3 minutes. After 9 p.m., violence tapered off quickly, with incidents occurring once every 35 minutes.

In the early evening, there was a murder or killing once every 31 minutes. Later, once every two hours.

American Broadcasting Company evening programming was most violent, with 97 incidents and 47 killings, the National Broadcasting Company showed 63 incidents and 23 killings, and the Columbia Broadcasting System televised 41 incidents and 14 killings the survey reported.

But what credit C.B.S. won for its evening shows, it lost on Saturday morning. Two of the most violent cartoons for children were on C.B.S. In a half hour, the "Herculoids" raced through 18 violent incidents during which 20 monster people of various descriptions were shot, vaporized or mashed.

12. For a more complete treatment of the constitutional aspects of firearms legislation, see C. Bakal, *The Right to Bear Arms* (1966); California Legislative Assembly and Interim Committee on Criminal Procedure and Regulation and Control of Firearms, Sacramento, 1965; New York Legislative Joint Committee on Firearms and Ammunition Report, Albany, 1962; Brennan, *Some Aspects of Federalism*, 39 NYUL Rev. 780 (1964); Douglas, *Bill of Rights and the Free Society: An Individual View*, 13 Buffalo L. Rev. 1 (1963); Douglas, *Bill of Rights is Not Enough*, 38 N.Y.U.L. Rev. 207 (1963); Emery, *The Constitutional Right to Keep and Bear Arms*, 28 Harv. L. Rev. 473 (1915); Feller & Gotling, *Second Amendment: A Second Look*, 61 Nw. U.L. Rev. 46 (1966); Fletcher, *Corresponding Duty to the Right of Bearing Arms*, 39 Fla. B.J. 167 (1965); Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the 14th Amendment*, 78 Harv. L. Rev. 746 (1965); Kurland, *Supreme Court and the Attrition of State Power*, 10 Stan. L. Rev. 274 (1958); Rohner, *Right to Bear Arms: A Phenomenon of Constitutional History*, 16 Catholic U.L. Rev. 53 (1966); Rudman, *Incorporation Under the 14th Amendment - The Other Side of the Coin*, 3 Law in Trans. Q. 141 (1966); Law Year Symposium on the Bill of Rights, 48 Woman L.J. (1962); Note, *Firearms - A Comparative Analysis of Proposed Federal Controls*, 15 DePaul L. Rev. 164 (1965); Note, *Right to Bear Arms - A Study in Judicial Misinterpretation*, 2 Wm. & Mary L. Rev. 381 (1960); Note *Bill of Rights: A Limitation on the Several States or the Federal Government?*, 2 Wm. & Mary L. Rev. 437 (1960).

13. See *United States v. Cruikshank*, 92 U.S. 542 (1875); *United States v. Adams*, 11 F. Supp. 216 (S.D. Fla. 1935).

14. *United States v. Miller*, 307 U.S. 174, 178 (1939).

15. *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942), cert. denied sub nom. *Velazquez v. United States*, 319 U.S. 770 (1943).

16. *United States v. Miller*, supra note 14; *Cases v. United States*, supra note 15; *United States v. Tot*, 131 F.2d 261 (3d Cir. 1942), rev'd on other grounds, 319 U.S.

463 (1943).

17. See the compilation of state constitutional provisions in McKenna, *The Right to Keep and Bear Arms*, 12 Marq. L. Rev. 138, 138-42 nn 5-19 (1928).

18. *Presser v. Illinois*, 116 U.S. 252 (1886): for a comprehensive survey of state decisions, see Comment, *The Philadelphia Firearms Ordinance - A Case of Comprehensive Oversight*, 114 U. Pa. L. Rev. 550, 553 n.27 (1966).

19. Hearings on H.R. 9066 Before House Comm. on Ways and Means, 73d Cong., 2d Sess. 18-19 (1934).

20. Hearings on S. 3 Before the Senate Comm. on Commerce, 74th Cong., 1st Sess. (1935).

21. S. Rep. 997, 74th Cong., 1st Sess. (1935). H. Rep. 2663, 75th Cong., 3d Sess (1938). S. Rep. 82, 75th Cong., 1st Sess. (1937).

22. 26 U.S.C. sect.5801-62(1967). Briefly, this is a registration and tax statute designed to curtail certain "gangster type" weapons - weapons which generally have extremely limited value for sporting use but which may be of value to the gun collector. The act does not apply to firearms which are not capable of firing fixed ammunition, and thus some types of antique weapons are exempted.

The covered weapons must be registered with the Alcohol and Tobacco Tax Division of the Internal Revenue Service of the Treasury Department. If a person possess one of these firearms and has not acquired it pursuant to the act, obtaining an application for transfer, he must register the weapon, report his name, address, and place of business and the place where the firearms is usually kept. When application for transfer is made a form must be filled out for approval by the Treasury Department. The applicant must furnish his fingerprints and photograph in addition to all identifying marks of the firearm and his reason for desiring such a firearm.

Unserviceable weapons are not subject to the 200-dollar transfer tax; however, their exemption must be registered in the normal manner. This provision allows collectors to display machine guns and other firearms of this type for trophies. Brown, *Firearms Regulations*, 17 W. Res. L. Rev. 569, 571 (1965).

23. 11 F. Supp. 216 (S.D. Fla. 1935).

24. *Supra* note 14.

25. *Supra* note 15.

26. *Supra* note 16.

27. 15 U.S.C. sect. 901-09(1968) (repealing Pub. Law 90-35 tit. 4, sect. 906, 82k Stat. 234). This act has two main parts - licensing provision for dealers and manufacturers and a section prohibiting the interstate shipment of firearms or ammunition to fugitives from justice, convicted felons, persons under indictment, and other persons not authorized to own such firearms under local law. Manufacturers of firearms or ammunition must pay a twenty-five dollar licensing fee while dealers must pay a fee of one dollar; both must keep records of each firearm received or shipped in interstate and foreign commerce. The shipper is required to receive evidence that the person to whom the firearms or ammunition is to be shipped is authorized under local law to receive such items. Generally, however, the only regulation which the dealer observes is to require the prospective purchaser to sign a statement that the does not fall within the

prohibited class. The firearm or ammunition is then shipped with no additional questions asked.

See discussion of postal regulations in *Brown, Firearms Regulations*, supra note 22 at 571.

On the ability of postal authorities to control transportation of guns, the following United Press dispatch (reported in the *Los Angeles Times*, July 26, 1968) is significant:

The Post Office Department said Thursday is 'absolutely powerless to prevent delivery of rifles and shotguns into areas of unrest such as Cleveland's battle-scarred east side. Timothy May, Post Office Department general counsel advised Rep. Charles Vanik (D-Ohio) that there was a department regulation requiring that law enforcement officers be notified of the name and address of persons who are receiving long guns through the mail. But the department may not withhold delivery of that firearm, even though requested by the police, May added. He said, 'The department is absolutely powerless under the present law to prevent the delivery of long guns, even into riot areas.'

28. *United States v. Tot*, 28 F. Supp. 900, 903 (D.N.J. 1939).

29. *English v. State*, 35 Tex. 473, 477 (1872); see also *City of Salina v. Blaksley*, 72 Kan. 230, 83, P. 619, (1905).

30. *Bliss v. Commonwealth*, 12Ky (Litt.) 90, 13 Am. Dec. 251 (1822).

31. *Robertson v. Baldwin*, 165 U.S. 275, 282 (1897).

32. *Commonwealth v. Murphy*, 166 Mass. 171, 44 N.E. 138 (1896).

33. *English v. State*, supra note 29.

34. *Strickland v. State*, 137 Ga. 1, 72 S.E. 260 (1911); accord, *Haile v. State*, 38 Ark. 564 (1882).

35. *City of Salina v. Blaksley*, supra note 29; accord, *Presser v. Illinois*, supra note 18.

36. McKenna, *The Right to Keep and Bear Arms*, supra note 17, at 143.

37. *Aymette v. State*, 21 Tenn. 154, 158 (1840); see also *People ex. rel. Leo v. Hill*, 126 N.Y. 497, 27 N.E. 789 (1891).

38. *City of Salina v. Blaksley*, supra note 29.

39. McKenna, *The Right to Keep and Bear Arms*, supra note 117, at 145. McKenna suggested in his provocative law review article (at 149) that some future courts might say that "the states may have their well-regulated militia even though individuals possess no weapons of their own, provided the states supply the necessary armament upon mobilization."

40. Rohner, *Right to Bear Arms: A Phenomenon of Constitutional History*, supra note 12.

41. The Preamble to the Declaration of Rights of 1688 asserted that it contained the "true, ancient, and indubitable rights of the people of this realm."

42. The French Revolution's "Declaration of the Rights of Man and of the Citizen" of August 26, 1789, assumes a right of "resistance to oppression" but contains no reference to the bearing of arms. See *II Constitutions of Nations* 21 (Peaslee ed. 1956). The United Nations Charter does not acknowledge a right to bear arms.

43. Rohner, *Right to Bear Arms: A Phenomenon of Constitutional History*, supra note 12, at 61.

- 44.1 Blackstone, Commentaries 144 (12th ed. 1795). Indeed if we follow Blackstone back to ancient Greece, we find the law of Solon referring to every Athenian who walked about the city armed being subject to a fine. 5 Blackstone, Commentaries 149 (12th ed. 1795).
45. Emery, The Constitutional Right to Keep and Bear Arms, *supra* note 12.
- 46.2 Story, Commentaries on the Constitution 678 (3d ed. 1858).
47. Rohner, Right to Bear Arms: A Phenomenon of Constitutional History, *supra* note 12, at 61.
48. Firearms Act 1937, 1 Edw. 8 & 1 Geo. 6, ch. 12. The law is a consolidation of measures passed from 1920 to 1936.
49. Letter from the Commissioner of Police of the Metropolis [Scotland Yard] to Harvard Law Review, Nov. 9, 1966.
50. Firearms Act 1965, c. 44. Another amendment to the Act, in 1953, had a similar focus. Prevention of Crime Act 1953, 1 & 2 Eliz. 2, c.14.
- 51.707 Parl. Deb., H.C. (5th ser.) 1142 (1965).
52. 1965 Juvenile Delinquency Hearings 602 (exhibit no. 94). The hearings developed that firearms were used in 1062 homicides and aggravated assaults in Washington, D.C. in 1964; *id.* at 450, Philadelphia reports 1400 cases involving felonious use of firearms and 599 other firearms violations in 1964.
53. N.Y. Times, Oct. 1, 1961, at 9, col. 7.
54. Scotland Yard reports that it can be said "with some confidence" that the objectives of eliminating the "improper and careless custody and use of firearms...and making it difficult for criminals to obtain them...are effectively achieved." Letter, *supra* note 49.
55. Rifles and shotguns are not covered by the law; estimates of shotgun ownership vary between 5000,000 and 1 million. 707 Parl. Deb., H.C. (5th ser.) 1144 (1965).
56. 1 Annals of Cong. 434 (1789).
57. *Id.* at 749.
58. *Id.* at 749-50.
59. Ga. Const. of 1777, arts. XXXIV and XXXV.
60. S.C. Const. of 1778, art. XLII.
61. "That a well-regulated militia is the proper and natural defence of a free government" (Mdd. Const. of 1776, art. XXV)' "A well-regulated militia is the proper, natural, and sure defence of a state" (N.H. Const. of 1784, art. XXIV).
62. N.Y. Const. of 1777, art. XL.
63. Mass. Const. of 1780, art. XVII.
64. N.C. Const. of 1776, art. XVII.
65. Va. Bill of Rights of 1776 section 13.
66. Pa. Const. of 1776, art XIII.
67. Vt. Const. of 1777, art. XV.
68. The following states have no such constitutional provision: California, Delaware, Illinois, Iowa, Maryland, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Virginia, West Virginia, and Wisconsin.
69. Most of these states have interpreted their constitutional provisions as permitting reasonable regulations for the general welfare and public safety.

Brown, Firearms Regulations, *supra* note 22, at 574.

70. Ky. Const. of 1799, art. 10, Section 23; *supra* note 30.

71. Ky. Const. Bill of Rights, Section 1.

72. States in which the right to prevent carrying concealed weapons is reserved to the legislature: Colorado: Colo. Const., art. 2, Section 13; Kentucky: Ky. Const. Bill of Rights, Section 1; Louisiana: La. Const., art 7 Section 8; Mississippi: Miss. Const., art. 3 Section 12; Missouri: Mo. Const., art. 1, Section 23; Montana: Mont. Const., art. 3, Section 13; New Mexico: N.M. Const., art. 2 Section 6; North Carolina: N.C. Const., art. 1, Section 24.

States which reserve the right to regulate the manner of carrying or bearing guns to the legislature: Florida: Fla. Const. Declaration of Rights, Section 20; Georgia: Ga. Const., art. 1, Section 2-122; Idaho Const., art 1, Section 11; Oklahoma: Okla. Const., art. 2, Section 26; Tennessee: Tenn. Const., art. 1, && 26; Texas : Texas Const., art. 1, Section 23; Utah: Utah Const. , art. 1, Section 677.

73. States in which reasonable regulation of right to bear arms held valid in absence of constitutional authority: Alabama: *Jackson v. State*, 37 Ala. App. 335, 68 So. 2d 850 (1953); Arkansas: *Wilson v. State*, 33 Ark. 557, 34 Am. R. 52 (1878); California: *People v. Ferguson*, 129 Cal. App. 300, 18 P.2d 741 (1933); Indiana: *Mathews v. State*, 237 Ind. 677, 148 N.E.2d 334 (1958); *MacIntyre v. State*, 170 Ind. 163, 83 N.E. 1005 (1908); *State v. Mitchell*, 3 Black. 229 (1833); Kansas: *City of Salina v. Blaksley*, *supra* note 29; Michigan: *People v. Brown*, 253 Mich. 537, 235 N.W. 245 (1931); *People v. Zerillo*, 219 Mich. 635, 189 N.W. 927 (1922); Ohio: *State v. Nieto*, 101 Ohio St. 409, 130 N.E. 663 (1920); *Akron v. Williams*, 113 Ohio App. 293, 177 N.E.2d 802 (1960); Oregon : *State v. Robinson*, 217 Ore. 612, 2343 P.2d 886 (1959); Pennsylvania: *Commonwealth v. Kreps*, 25 Dauph. 335 (1922); *Wright v. Commonwealth*, 77 Pa. 470 (1875); Washington: *State v. Krantz*, 24 Wash. 2d 350, 164 P. 2d 453 (1945); *State v. Tully*, 198 Wash. 605, 898 P.2d 517 (1939).

74. States in which "arms" held not to include certain regulated weapons: *Arkansas Fife v. State*, 31, Ark. 455, 25 Am. R. 556 (1876); Pennsylvania: *Commonwealth v. Krepos*, *supra* note 73.

75. M. Wolfgang, *Patterns in Criminal Homicide* 82-83 (1966).

76. Zimring, *Is Gun Control Likely to Reduce Violent Killings?*, Center for Studies in Criminal Justice at the University of Chicago Law School, Table 1. (General domestic, 17%; money, 9%; liquor [barroom brawls] 7%; sex, 2%; triangle, 6% racial, 1%; children, 2%; other types in the heat of passion, 38%; teen gang disputes, 3%; robbery, 12%; others, 3%.) A total of 551 cases were analyzed.

77. *Id.*, Table 2. (Friends and acquaintances, 41%; spouse or lower, 20%; other family relationship, 7%; neighbors, 3%; business associates, 3%; other 4%.)

78. *Id.*, Table 4.

79. *Id.*, Table 6.

80. This is not at all certain. See quotation from an official of the Los Angeles Police Department, 31 Chi. L. Rev. 780, 782 (1964): "Since Congress passed the National Firearms Act of 1934, the syndicated hoodlums who infest our major cities have given up the machine gun as a tool of the trade."

81. *Chicago Daily News*, Aug. 27, 1968.

82. Comment, 80 Harv. L. Rev. 1328, 1345-46 (1967).

83. Report of the President's Commission on the Assassination of President Kennedy 118 (1964).

TO KEEP AND BEAR THEIR PRIVATE ARMS: THE
ADOPTION OF THE SECOND AMENDMENT, 1787-1791

by Stephen P. Halbrook*

After the Constitution was submitted for ratification in 1787, political writings and debates in state conventions revealed two basic positions: the federalist view that a bill of rights was unnecessary because the proposed government had no positive grant of power to deprive individuals of rights, and the anti-federalist contention that a formal declaration would enhance protection of those rights. On the subject of arms, the federalists promised that the people, far from ever being disarmed, would be sufficiently armed to check an oppressive standing army. The anti-federalists feared that the body or the people as militia would be overpowered by a select militia of standing army unless there was a specific recognition of the individual right to keep and bear arms.¹

While their sojourns abroad prevented their active involvement in the ratification process, John Adams and Thomas Jefferson, the future leaders of the federalist and republican parties respectively, reiterated in 1787 their preferences for an armed populace. In his defense of the American constitutions, John Adams relied on classical sources in the context of an analysis of quotations from Marchamont Nedham's *The Right Constitution of a Commonwealth* (1656) to vindicate a militia of all the people:

"That the people be continually trained up in the exercise of arms, and the militia lodged only in the people's hands, or that part of them which are most firm to the interest of liberty, that so the power may rest fully in the disposition of their supreme assemblies." The limitation to "That part most firm to the interest of liberty," was inserted here, no doubt to reserve the right of disarming all the friends of Charles Stuart,

the nobles and bishops. Without stopping to enquire into the justice, policy, or necessity of this, the rule in general is excellent...One consequence was, according to [Nedham], "that nothing could at any time be imposed upon the people but by their consent...As Aristotle tells us, in his fourth book on Politics, the Grecian states ever had special care to place the use and exercise of arms in the people, because the commonwealth is theirs who hold the arms: the sword and sovereignty ever walk hand in hand together." This is perfectly just. "Rome, and the territories about it, were trained up perpetually in arms, and the whole commonwealth, by this means, became one formal militia."²

After agreeing that all the continental European states had achieved absolutism by following the Caesarian precedent of erecting "praetorian bands, instead of a public militia,"³ the aristocratic Adams rejected the very right which won independence from England: "To suppose arms in the hands of citizens to be used at individual discretion, except in private self-defense, or by partial orders of towns...is a dissolution of the government."⁴ But for the more radical Thomas Jefferson, individual discretion was acceptable for the use of arms not simply for private, but also for public defense. Writing in 1787, Jefferson stressed the inexorable connection between the right to have and use arms and the right to revolution as follows:

God forbid we should ever be twenty years without such a rebellion...And what country can preserve its liberties, if its rulers are not warned from time to time, that this people preserve the spirit of resistance? Let them take arms...The tree of liberty must be refreshed from time to time, with the blood of patriots and tyrants.⁵

I. The Controversy Over Ratification of the Constitution

A. The Federalist Promise: To Trust the People with Arms

It was characteristic of the times that the federalists were actually in close agreement with Jefferson on the right to arms as a penumbra of the right to revolution. Thus, in The Federalist No. 28, Hamilton wrote: "If the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense which is paramount to all positive forms of government..."⁶ And in No. 29, Hamilton related the argument that it would be wrong for a government to require

the great body of yeomanry and of the other classes of citizens to be under arms for the purpose of going through military exercises and evolutions, as often as might be necessary to acquire the degree of perfection which would entitle them to the character of a well-regulated militia...Little more can reasonably be aimed at with respect to the people at large than to have them properly armed and equipped...

This will not only lessen the call for military establishments, but if circumstances should at any time oblige the government to form an army of any magnitude that army can never be formidable to the liberties of the people while there is a large body of citizens, little if at all inferior to them in discipline and the use of arms, who stand ready to defend their rights and those of their fellow-citizens.⁷

In The Federalist No. 46, Madison, contending that "the ultimate authority...resides in the people alone,"⁸ predicted that encroachments by the federal government would provoke "[p]lans of resistance" and an "appeal to a trial of force."⁹ To a regular army of the United States government "would be opposed a militia amounting to near half a million of citizens with arms in their hands," and referring to "the advantage of being

armed, which the Americans possess over the people of almost every other nation," Madison wrote:

"Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms."¹⁰ If the people were armed and organized into militia, "the throne of every tyranny in Europe would be speedily overturned in spite of the legions which surround it."¹¹

The Constitution's proponents agreed that it conferred no federal power to deprive the people of their rights, because there was no explicit grant of such power and because the state declarations of right would prevail.¹² The existence of an armed populace, superior in its forces even to a standing army, and not a paper bill of rights, would check despotism. Noah Webster promised that even without a bill of rights, the American people would remain armed to such an extent as to be superior to any standing army raised by the federal government:

Another source of power in government is military force. But this, to be efficient, must be superior to any force that exists among the people, or which they can command; for otherwise this force would be annihilated, on the first exercise of acts of oppression. Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States. A military force, at the command of Congress, can execute no laws, but such as the people perceive to be just and constitutional; for they will possess the power, and jealousy will instantly inspire the inclination, to resist the execution of a law which appears to them unjust and oppressive.¹³

Tench Coxe argued in his influential *An American Citizen* that, should tyranny threaten, the "friends to liberty...using those arms which Providence has put into their hands, will make a solemn appeal to 'the power above.'"¹⁴ Coxe also wrote: "The militia, who are in fact the effective part of the people at large, will render many troops quite unnecessary. They will form a powerful check upon the regular troops, and will generally be sufficient to overawe them..."¹⁵ Writing as "A Pennsylvanian," Coxe went into even more detail:

The power of the sword, say the minority of Pennsylvania, is in the hands of Congress. My friends and countrymen, it is not so, for THE POWERS OF THE SWORD ARE IN THE HANDS OF THE YEOMANRY OF AMERICA FROM SIXTEEN TO SIXTY. the militia of these free commonwealths, entitled and accustomed to their arms, when compared with any possible army, must be tremendous and irresistible. Who are the militia? Are they not ourselves. Is it feared, then, that we shall turn our arms each man against his own bosom. congress have no power to disarm the militia. Their swords, and every other terrible implement of the soldier, are the birth-right of an American...[T]he unlimited power of the sword is not in the hands of either the federal or state governments, but where I trust in God it will ever remain, in the hands of the people.¹⁶

In summary, the Constitution's proponents promised that the individual right to keep and bear arms would be not simply a formal right but a fact which would render an armed citizenry more powerful than any standing army, and consequently a bill of rights was unnecessary. It was natural that the virtue of an armed populace or general militia was stressed in terms of its political value for a free society, since the ratification process involved political issues. Nonetheless the right to have weapons for non-political purposes such as self-protection or hunting - but never for aggression - appeared so obviously to be the heritage

of free people as never to be questioned. In the words of "Philodemos": "Every free man has a right to the use of the press, so he has the use of his arms." But if he commits libel, "he abuses his privilege, as unquestionably as if he were to plunge his sword into the bosom of a fellow citizen..." Punishment, not "previous restraints," was the remedy for misuse of either right.¹⁷

B. Anti-Federalist Fears: The People Disarmed,
A Select Militia

Among the anti-federalist spokesmen, the great fear was that without protection by a bill of rights, creation of a select militia or standing army would result in the disarming of the whole people as militia and the consequent oppression of the populace. This fear had been expressed by the prediction of Oliver Ellsworth in the Federal Convention that the creation of "a select militia...would be followed by a ruinous declension of the great body of the militia."¹⁸ John DeWitt contended: "It is asserted by the most respectable writers upon government, that a well regulated militia, composed of the yeomanry of the country, have ever been considered as the bulwark of a free people. Tyrants have never placed any confidence on a militia composed of freemen."¹⁹ DeWitt predicted that Congress "at their pleasure may arm or disarm all or any part of the freemen of the United States, so that when their army is sufficiently numerous, they may put it out of the power of the freemen militia of America to assert and defend their liberties..."²⁰

George Clinton, writing as "Cato," predicted permanent force because of "the fear of a dismemberment of some of its parts, and the necessity to enforce the execution of revenue laws (a fruitful source of oppression)..."²¹ "A Federal Republican" foresaw an army used "to suppress those struggles which may sometimes happen among a free people, and which tyranny will impiously brand with the name of sedition."²² The admission *** some federalists, particularly James Wilson, that a small standing army was led to a particularly fearful reaction by anti-federalists

"[F]reedom revolts at the idea,"²³ according to Eldridge Gerry, for the militia would become a federal force which "May either be employed to extort the enormous sums that will be necessary to support the civil list - to maintain the regalia of power - and the splendour of the most useless part of the community or they may be sent into foreign countries for the fulfillment of treaties..."²⁴ Praising the Swiss militia model, "A Democratic Federalist" rejected Wilson's argument for a standing army, "that great support of tyrants," with the following reasoning:

Had we a standing army when the British invaded our peaceful shores? Was it a standing army that gained the battle of Lexington and Bunker's Hill, and took the ill-fated [John] Burgoyne? Is not a well-regulated militia sufficient for every purpose of internal defense? And which of you, my fellow citizens, is afraid of any invasion from foreign powers, that our brave militia would not be able immediately to repel?²⁵

The most influential writings stating the case against ratification of the Constitution without a bill of rights consisted of Richard Henry Lee's LETTERS FROM THE FEDERAL FARMER (1787-1788) (hereinafter LETTERS). Since most of Lee's proposals for specific provisions of a bill of rights were subsequently adopted in the Bill of Rights, some with almost identical wording, the LETTERS provide an excellent commentary on the meaning of the provisions of the Bill of Rights in general and the second amendment in particular. Predicting the early employment of a standing army through taxation, Lee contended:

It is true, the yeomanry of the country possess the lands, the weight of property, possess arms, and are too strong a body of men to be openly offended - and, therefore, it is urged, they will take care of themselves, that men who shall govern will not dare pay any disrespect to their opinions. It is easily perceived, that

if they have not their proper negative upon passing laws in congress, or on the passage of laws relative to taxes and armies, they may in twenty or thirty years be by means imperceptible to them, totally deprived of that boasted weight and strength: This may be done in a great measure by congress, if disposed to do it, by modelling the militia. Should one fifth or one eighth part of the men capable of bearing arms, be made a select militia, as has been proposed, and those the young and ardent part of the community, possessed of but little or no property, and all the others put upon a plan that will render them of no importance, the former will answer all the purposes of an army, while the latter will be defenseless...I see no provision made for calling out the posse comitatus for executing the laws of the union, but provision made for congress to call forth the militia for the execution of them - and the militia in general, or any select part of it may be called out under military officers, instead of the sheriff to enforce an execution of federal laws, in the first instance, and thereby introduce an entire military execution of the laws.²⁶

In his second series of LETTERS, Lee classified as "fundamental rights" the rights of free press, petition, and religion; the rights to speedy trial, trial by jury, confrontation of accusers and against self-incrimination; the right not to be subject to unreasonable searches or seizures of his person, papers or effects"; and, in addition to the right to refuse quartering of soldiers, "the militia ought always to be armed and disciplined, and the usual defense of the country..."²⁷ Since these rights were all to be recognized in the Bill of Rights, it is appropriate to examine in detail the substance of Lee's concept of the militia:

A militia, when properly formed, are in fact the people themselves, and render regular

troops in a great measure unnecessary...[T]he constitution ought to secure a genuine and guard against a select militia, by providing that the militia shall always be kept well organized, armed, and disciplined, and include...all men capable of bearing arms; and that all regulations tending to render this general militia useless and defenceless, by establishing select corps of militia useless and defenceless, by establishing select corps of militia, or distinct bodies of military men, not having permanent interests and attachments in the community to be avoided.²⁸

Thus, Lee feared that Congress, through its "power to provide for organizing, arming, and disciplining the militia" under article I Sect. 8 of the proposed Constitution, would establish a "select militia" apart from the people which would be used as an instrument of domination by the federal government. The contemporary argument, that it is impractical to view the militia as the whole body of the people, and that the militia consists of the select corps known as the National Guard, also existed during the time of Lee, who refuted it in these terms:

but, say gentlemen, the general militia are for the most part employed at home in their private concerns, cannot well be called out, or be depended upon; that we must have a select militia; that is, as I understand it, particular corps or bodies of young men, and of men who have but little to do at home, particularly armed and disciplined in some measure, at the public expense, and always ready to take the field. These corps, not much unlike regular troops, will ever produce an inattention to the general militia; and the consequence has ever been, and always must be, that the substantial men, having families and property, will generally be without arms, without knowing the use of them, and defenseless; whereas, to preserve liberty, it is essential

that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them; nor does it follow from this, that all promiscuously must go into actual service on every occasion. The mind that aims at a select militia, must be influenced by a truly anti-republican principle; and when we see many men disposed to practice upon it, whenever they can prevail, no wonder true republicans are for carefully guarding against it.²⁹

Richard Henry Lee's view that a well regulated militia was the armed populace rather than a select group, or "Prussian militia,"³⁰ was reiterated by proponents and opponents of a bill of rights. As "M.T. Cicero" wrote to "The Citizens of America":

Whenever, therefore, the profession of arms becomes a distinct order in the state...the end of the social compact is defeated...No free government was ever founded, or ever preserved its liberty, without uniting the characters of the citizen and soldier in those destined for the defence of the state...Such are a well regulated militia, composed of the freeholders, citizen and husbandman, who take up arms to preserve their property, as individuals, and their rights as freemen.³¹

The armed citizens would defend not only against foreign aggression, but also domestic tyranny. As expressed by another commentator: "The government is only just and perfectly free...where there is also a dernier resort, or real power left in the community to defend themselves against any attack on their liberties."³²

While the view continued to be expressed that "a bill of rights as long as my arm" had no place in the Constitution,³³ a correspondent of the opposite persuasion noted that throughout his state people were "repairing and cleaning their arms, and every young fellow who is able to do it, is providing himself with

a rifle or musket, and ammunition," but that civil war would be averted by adoption of a bill of rights.³⁴ If these views reflect the resultant compromise that a bill of rights would guarantee broad rights without being overly detailed, they also indicate that the demand for a bill of rights was as strong as the demand for independence a decade before. And consistent throughout the debate thereon was the general understanding that the right to keep and bear arms was an individual right.³⁵

C. Demands in the State Conventions for a Written Guarantee that Every Man be Armed

In the debates in the state conventions over the ratification of the Constitution, the existence of unarmed citizenry was presumed by federalists and anti-federalists alike as requisite to prevent despotism. Issues which divided the delegates included whether a written bill of rights guaranteeing the right to keep and bear arms and other individual rights should be added to the Constitution, and whether a provision guarding against standing armies or select militias was necessary. IN the Pennsylvania convention, John Smilie warned: "Congress may give us a select militia, may say there shall be no militia at all. When a select militia is formed; the people in general may be disarmed."³⁶ This argument assumed that the right to keep and bear arms³⁷ would be protected by the people combining into general militias to prevent being disarmed by select forces. In response, James Wilson contended that the Constitution already allowed for the ultimate force in the people: "In its principles, it is surely democratical; for, however wide and various the firearms of power may appear, they may all be traced to one source, the people."³⁸

In the Massachusetts convention, William Symmes warned that the new government at some point "shall be too firmly fixed in the saddle to be overthrown by any thing but a general insurrection."³⁹ Yet fears of standing armies were groundless, affirmed Theodore Sedgwick, who queried, "[I]f raised, whether they could subdue a nation of freemen, who know how to prize

liberty, and who have arms in their hands?"⁴⁰ In New York, Tredwell feared that "we may now surrender, with a little ink, what it may cost seas of blood to regain."⁴¹ And in the North Carolina convention, William Lenoir worried that Congress can "disarm the militia. If they were armed, they would be a resource against great oppressions...If the laws of the Union were oppressive, they could not carry them into effect, if the people were possessed of proper means of defense."⁴²

But it was Patrick Henry in the Virginia convention who exposted most thoroughly the dual rights to arms and resistance to oppression: "Guard with jealous attention the public liberty. Suspect every one who approaches that jewel. Unfortunately, nothing will preserve it but downright force. Whenever you give up that force, you are inevitably ruined."⁴³ Fearful of the power of Congress over both a standing army and the militia, Henry asked, "Have we the means of resisting disciplined armies, when our only defence, the militia, is put into the hands of Congress?"⁴⁴ Furthermore, "of what service would militia be to you, when, most probably, you will not have a single musket in the state? For, as arms are to be provided by Congress, they may or may not furnish them."⁴⁵ It was to meet such objections that prompted the adoption later of the second amendment, which sought to guarantee the revolutionary ideal expressed by Henry in these words: "The great object is, that every man be armed...Every one who is able may have a gun."⁴⁶ Henry's objection to federal control over arsenals within the states would apply equally to control over private arms:

Are we at last brought to such a humiliating and debasing degradation, that we cannot be trusted with arms for our own defence? Where is the difference between having our arms in our own possession and under our own direction, and having them under the management of Congress? If our defence be the real object of having those arms, in whose hands can they be trusted with more propriety, or equal safety to us, as in our own hands?⁴⁷

George Mason buttressed Henry's arguments by pointing out that pro-British strategists resolved "to disarm the people; that it was the best and most effectual way to enslave them...by totally disusing and neglecting the militia."⁴⁸ Mason also clarified that under prevailing practice the militia included all people, rich and poor. "who are the militia? They consist now of the whole people, except a few public officers."⁴⁹ Throughout the debates Madison sought to picture the observations of Henry and Mason as exaggerations and to emphasize that a standing army would be unnecessarily consequent on the existence of militias⁵⁰ - in short, that the people would remain armed. And Zachariah Johnson argued that the new Constitution could never result in religious or other oppression: "The people are not to be disarmed of their weapons. They are left in full possession of them."⁵¹

The objections of the anti-federalist pamphleteers and orators, particularly George Mason and Richard Henry Lee, prompted the state ratifying conventions to recommend certain declarations of rights which became the immediate source of the Bill of Rights. Each and every recommendation which mentioned the right to keep and bear arms clearly intended an individual right. The individual character of the right is evident additionally in those proposals made in the conventions wherein a majority of delegates voted against a comprehensive bill of rights. The latter was the case in regard to the proposals of Samuel Adams in the Massachusetts convention "that the said Constitution be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United States who are peaceable citizens, from keeping their own arms..."⁵² Similarly, the proposals adopted by the Pennsylvania minority included the following:

That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public

injury from individuals...⁵³

New Hampshire was the first state to ratify the Constitution and recommended that it include a bill of rights, including a provision that "Congress shall never disarm any Citizen, unless such as are or have been in Actual Rebellion."⁵⁴ Not only are these words in no way dependent upon militia uses, but the provision is separated from another article against standing armies by a provision concerning freedom of religion.⁵⁵ The New Hampshire convention was the first wherein a majority proposed explicit recognition of the individual right later expressed in the second amendment.⁵⁶ The New Hampshire and Pennsylvania proposals for the right to keep and bear arms were viewed as among "those amendments which particularly concern several personal rights and liberties."⁵⁷

George Mason's pen was at work in Virginia, which suggested the following provision:

The people have a right to keep and bear arms: that a well regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace are dangerous to liberty, and therefore ought to be avoided...⁵⁸

Since these three propositions are stated independently of one another, it is obvious that the first is a general protection of the individual right to have arms for any and all lawful purposes, and is in no way dependent on the militia clause that follows. Madison's draft of the second amendment as later proposed with the Bill of Rights in Congress relied specifically on the recommendation by the Virginia convention.⁵⁹

The New York convention predicated its ratification of the Constitution on the following interconnected propositions:

The powers of government may be reassumed by the people whensoever it shall become necessary to

their happiness...That the people have a right to keep and bear arms: that a well regulated militia, including the body of the people capable of bearing arms, is the proper, natural, and safe defence of a free state.⁶⁰

Explicit in this language are the two independent declarations that individuals have a right to be armed and that the militia is the armed people. Similar language was adopted by the conventions of Rhode Island⁶¹ and North Carolina.⁶²

II. The Ratification of the Bill of Rights

A. Madison's Proposed Amendments: Guarantees of Personal Liberty

In acknowledgment of the conditions under which the state conventions ratified the Constitution, and in response to popular demand for a written declaration of individual freedoms, in 1789 the first U.S. Congress, primarily through the pen of James Madison, submitted for ratification by the states the Amendments to the Constitution which became the Bill of Rights. Relying upon the Virginia Declaration of Rights and the amendments proposed by the state conventions,⁶³ on June 8, 1789, Madison proposed in the House of Representatives a bill of rights which included the following: "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person."⁶⁴ That Madison intended an individual right is clear not only from this wording, but also from his notes for his speech proposing the amendment: "They [proposed amendments] relate 1st. to private rights - fallacy on both sides - especy as to English Decln. of Rts. - 1. mere act of parlt. 2. no freedom of press - Conscience...attainders - arms to protestts."⁶⁵

Madison's colleagues clearly understood the proposal to be protective of individual rights. Fisher Ames wrote:

"Mr. Madison has introduced his long expected amendments...It contains a bill of rights...the right of the people to bear arms."⁶⁶ Ames wrote another correspondent as follows: "The rights of conscience, of bearing arms, of changing the government, are declared to be inherent in the people."⁶⁷ And William Grayson informed Patrick Henry: "Last Monday a string of amendments were presented to the lower House: these altogether respected personal liberty..."⁶⁸

Ten days after the Bill of Rights was proposed in the House, Tench Coxe published this Remarks on the First Part of the Amendments to the Federal Constitution under the pen name "A Pennsylvanian" in the Philadelphia Federal Gazette, June 18, 1789, at 2, col. 1. Probably the most complete exposition of the Bill of Rights to be published during its ratification period, the Remarks included the following:

As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms.⁶⁹

In short, what is now the second amendment guaranteed the right of the people to have "their private arms" to prevent tyranny and to overpower an abusive standing army or select militia.

Coxe sent a copy of his article to Madison along with a letter of the same date. "it has appeared to me that a few well tempered observations on these propositions might have a good effect...It may perhaps be of use in the present turn of the public opinions in New York state that they should be republished there."⁷⁰ Madison wrote back acknowledging "[Y]our favor of the 18th instant. The printed remarks inclosed in it are already I find in the Gazettes here [New York]." Far from disagreeing that the amendment protected the keeping and bearing of "private arms," Madison explained that ratification of the amendments "will however be greatly favored by explanatory

strictures of a healing tendency, and is therefore already indebted to the co-operation of your pen."⁷¹

Coxe's defense of the amendments was widely reprinted.⁷² A search of the literature of the time reveals that no writer disputed or contradicted Coxe's analysis that what became the second amendment protected the right of the people to keep and bear "their private arms." The only dispute was over whether a bill of rights was even necessary to protect such fundamental rights. Thus, in response to Coxe's article, One of the People replied with On a Bill of Rights, which held "the very idea of a bill of rights" to be "a dishonorable one to freemen." "What should we think of a gentlemen, who, upon hiring a waiting-man, should say to him 'my friend, please take notice, before we come together, that I shall always claim the liberty of eating when and what I please, of fishing and hunting upon my own ground, of keeping as many horses and hounds as I can maintain, and of speaking and writing any sentiments upon all subjects." In short, as a mere servant, the government had no power to interfere with individual liberties in any manner absent a specific delegation. "[A] master reserves to himself...every thing else which he has not committed to the care of those servants."⁷³

The House Committee on Amendments subsequently reported the guarantee in this form: "A well regulated militia, composed of the body of the people, being the best security of free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms."⁷⁴ The House debated this proposal on August 17 and 20, 1789. Elbridge Gerry clarified that the purpose of the amendment was protection from oppressive government, and thus the government should not be in a position to exclude the people from bearing arms:

This declaration of rights, I take it, is intended to secure the people against the maladministration of the Government; if we could suppose that, in all cases, the rights of the people would be attended to, the occasion for guards of this kind would be removed. Now, I am apprehensive, sir, that this clause would

give an opportunity to the people in power to destroy the constitution itself. They can declare who are those religiously scrupulous, and prevent them from bearing arms.

What, sir, is the use of militia? It is to prevent the establishment of a standing army, the bane of liberty. Now, it must be evident, that, under this provision, together with their other powers, Congress could take such measures with respect to a militia, as to make a standing army necessary. Whenever Government mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins. This was actually done by Great Britain at the commencement of the late revolution. They used every means in their power to prevent the establishment of an effective militia to the Eastward. The Assembly of Massachusetts, seeing the rapid progress that administration were making to divest them of their inherent privileges, endeavored to counteract them by the organization of the militia; but they were always defeated by the influence of the Crown.⁷⁵

Representative Gerry's argument was that the federal government should have no authority to categorize any individual as an unqualified under the amendment to bear arms. "Now, if we give a discretionary power to exclude those from militia duty who have religious scruples, we may as well make no provisions on this head."⁷⁶ The point was that keeping and bearing arms was a right of "the people," none of whom should thereby be disarmed under any pretense, such as the government determining that they are religiously scrupulous or perhaps that they are not active members of a select militia (e.g., the National Guard).

In reply, Representative Jackson "did not expect that all the people of the United States would turn Quakers or Moravians; consequently, one part would have to defend the other in case of invasion."⁷⁷ The

reference to "all the people" indicated again the centrality of the armed populace for defense against foreign attack. After further discussion, Gerry objected to the wording of the first part of the proposed amendment:

A well regulated militia being the best security of a free State, admitted an idea that a standing army was a secondary one. It ought to read, "a well regulated militia, trained to arms;" in which case it would become the duty of the Government to provide this security, and furnish a greater certainty of its being done.⁷⁸

Gerry's words exhibit again the general sentiment that security rested on a generally - rather than a selectly - armed populace. The lack of a second to his proposal suggests that the congressmen were satisfied that the simple keeping and bearing of arms by the citizens would constitute a sufficiently well regulated militia to secure a free state, and thus there was no need to make it, in Gerry's words, "the duty of the Government to provide this security..."

Further debate on the exemption of religiously scrupulous persons from being compelled to bear arms highlights the sentiment that not only bearing, but also the mere keeping, of arms by all people was considered both a right and a duty to prevent standing armies. The exemption would mean, objected Representative Scott, that "a militia can never be depended upon. This would lead to the violation of another article in the Constitution, which secures to the people the right of keeping arms, and in this case recourse must be had to a standing army."⁷⁹ "What justice can there be in compelling them to bear arms?" queried Representative Boudinot. "Now, by striking out the clause, people may be led to believe that there is an intention in the General Government to compel all its citizens to bear arms."⁸⁰ The proposed amendment was finally agreed to after insertion of the words "in person" at the end of the clause.⁸¹

In the meantime, debate over the proposed amendments raged in the newspapers. The underlying fear against a government monopoly of arms was expressed thusly: "Power should be widely diffused...The monopoly of power, is the most dangerous of all monopolies."⁸² The understanding that the keeping and bearing of private arms contributed to a well regulated militia was represented in the following editorial:

A late writer...on the necessity and importance of maintaining a well regulated militia, makes the following remarks: - A citizen, as a militia man, is to perform duties which are different from the usual transactions of civil society...[W]e consider the extreme importance of every military duty in time of war, and necessity of acquiring an habitual exercise of them in time of peace...⁸³

At the same time, what was to become the second amendment was not considered to condition having arms on the needs of the citizens in their militia capacity, but was seen as having originated in part from Samuel Adams' proposal (which contained no militia clause) that Congress could not disarm any peaceable citizens:

It may well be remembered, that the following "amendments" to the new constitution of these United States, were introduced to the convention of this commonwealth by ...Samuel Adams...[E]very one of the intended alterations but one [i.e., proscription of standing armies] have been already reported by the committee of the House of Representatives, and most probably will be adopted by the federal legislature. In justice therefore for that long tried Republican, and this numerous friends, you gentlemen, are requested to republish his intended alterations, in the same paper, that exhibits to the public, the amendments which the committee have adopted, in order that they may be compared together...

And that the said constitution be never construed to authorize congress...to prevent the people of the United States, who are peaceable citizens, from keeping their own arms...⁸⁴

Although many of the proposed amendments were subjected to criticism, what became the second amendment was apparently never attacked, aside from one editorial which argued that the militia clause was insufficient, but never questioned the right to bear arms clause. After quoting the language of the proposal as it was approved by the House, the well known anti-federalist Centinel opined:

It is remarkable that this article only makes the observation, 'that a well regulated militia, composed of the body of the people, is the best security of a free state;' it does not ordain, or constitutionally provide for, the establishment of such a one. The absolute command vested by other sections in Congress over the militia, or not in the least abridged by this amendment. The militia may still be subjected to martial law..., may still be marched from state to state and made the unwilling instruments of crushing the last efforts of expiring liberty.⁸⁵

This indicates the understanding that the militia clause was merely declaratory and did not protect state rights to maintain militias to any appreciable degree. That anti-federalists of the ink of Centinel never attacked the right to bear arms clause demonstrates that it was considered to recognize a full and complete guarantee of individual rights to have and use private arms. Surely a storm of protest would have ensued had anyone hinted that the right applied only to the much objected-to select militia.

B. From the Senate to the States: The Adoption of the Second Amendment

When the Senate came to consider the proposed amendments in early September, 1789, it became evident that while the right of individuals to keep and bear arms would not be questioned, attempts to strengthen recognition of state rights over militias and to proscribe standing armies would fail. Amendments mandating avoidance of standing armies were rejected,⁸⁶ as was a proposal "that each state respectively, shall have the power to provide for organizing, arming and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same."⁸⁷

The form of the amendment adopted by the Senate, and approved by both houses on September 25, 1789, was the same as subsequently became the second article of the Bill of Rights: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." Comparing the House resolve with that of the Senate, the former redundantly mentions "the people" twice - once as militia, again as the entity with the right to keep and bear arms - while the latter more succinctly avoided repetition by deleting the well recognized definition of militia as "the body of the people." The Senate also deleted the phrase that "no person religiously scrupulous shall be compelled to bear arms," perhaps because the amendment depicts the keeping and bearing of arms as an individual "right" for both public and private purposes, and perhaps to preclude any constitutional authority of the government to "compel" individuals without religious scruples to bear arms for any purpose. Finally, the Senate specifically rejected a proposal to add "for the common defense" after "to keep and bear arms,"⁸⁸ thereby precluding any construction that the right was restricted to militia purposes and to common defense against foreign aggression or domestic tyranny.

That the Senate's deletion of the well recognized definition of militia as "the body of the people" implied nothing other than its wish to be concise, but that its rejection of the proposal to limit the amendment's recognition of the right to bear arms "for the common defence" meant to preclude any limitation on the individual right to have arms,

e.g., for self-defense or hunting, is evident in the joint recommendation by the Senate and House of the Amendment to the states. "The conventions of a number of the states having, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added,"⁸⁹ was the language of Congress which prefaced the proposed amendments when submitted to the states. In short, Congress modelled the Bill of Rights, including the second amendment's implicit definition of militia as the whole people and explicit guarantee of the right to have arms to "the people," on the proposals submitted by the states, which in turn through their adoption thereof made the articles of amendment a part of the Constitution.

The adoption of the amendments by the states was by no means a foregone conclusion, and the ratification struggle ensued through 1791. Three positions emerged in the controversy: (1) the proposed amendments were adequate, (2) further guarantees were needed, and (3) freemen had no need of a bill of rights. None of the proponents of these respective positions ever called into question that keeping and bearing arms was a basic individual right. The common understanding was that the proposed bill of rights sought to guarantee personal, unalienable rights, but that unenumerated rights were also retained by the people.⁹⁰ Patrick Henry, Richard Henry Lee, and others were pleased with the bill of rights as far as it went, but wanted guarantees against standing armies and direct taxes.⁹¹ Since these same prominent anti-federalists were among the most vocal in calling for a guarantee recognizing the individual right to have arms, it is inconceivable that they would not have objected to what became the second amendment had anyone understood it not to protect personal rights.

The view that the rights of freemen were too numerous to enumerate in a bill of rights was coupled with the argument that the ultimate protection of American liberty would be the armed populace rather than a paper bill of rights. An opponent of a bill of rights, Nicholas Collins argued that the American people

would be sufficiently armed to overpower an oppressive standing army. "While the people have property, arms in their hands, and only a spark of noble spirit, the most corrupt Congress must be mad to form any project of tyranny."⁹² On the other hand, the pro-amendment view was that both the existence of a bill of rights and an armed populace to enforce it would provide complementary safeguards. The following editorial advances this view, and assumes not only that keeping and bearing arms contributes to a well regulated militia, but also that militia exercises in effect demonstrate the people's strength so that government would not consider infringing on the right to keep and bear arms:

The right of the people to keep and bear arms has been recognized by the General Government; but the best security of that right after all is, the military spirit, that taste for martial exercises, which has always distinguished the free citizens of these States; From various parts of the Continent the most pleasing accounts are published of reviews and parades in large and small assemblies of the militia...Such men form the best barrier to the Liberties of America.⁹³

While many people were thus flexing their muscles by engaging in armed marches to ward off tyranny and secure the right to keep and bear arms, the debate over ratification of the Bill of Rights raged through 1790. Some reiterated that no bill of rights could enumerate the rights of the peaceable citizen, "which are as numerous as sands upon the sea shore..."⁹⁴ President Washington reminded members of the House of Representatives that "a free people ought not only to be armed, but disciplined..."⁹⁵ Still, rights to arms provisions were not necessarily associated with the citizen's militia, but were also coupled with different provisions. For instance, a widely published proposed bill of rights for Pennsylvania included a militia clause in a separate article from the following: "That the right of the citizens to bear arms in defence of themselves and the State, and to assemble

peaceably together...shall not be questioned."⁹⁶

During the ratification period the view prevailed that the armed citizenry would prevent tyranny. Theodorick Bland wrote Patrick Henry that "I have founded my hopes to the single object of securing (in terrorem) the great and essential rights of freemen from the encroachments of Power - so far as to authorize resistance when they should be either openly attacked or insidiously undermined."⁹⁷ While the proposed amendments continued to be criticized due to lack of a provision on standing armies,⁹⁸ no one questioned the right to bear arms amendment.⁹⁹ Two days before Rhode Island ratified the bill of rights, newspapers in that state republished its declaration of natural rights included in its recent ratification of the Constitution: "That a well-regulated militia, including the body of the people capable of bearing arms, is the proper, natural and safe defense of a free state..."¹⁰⁰

As more and more states adopted the amendments and debate thereon began to dwindle, even proponents of an anti-standing army provision conceded that an armed citizenry, as a well regulated militia, would prevent oppression from that quarter. As "A Framer" argued to "The Yeomanry of Pennsylvania":

Under every government the dernier resort of the people, is an appeal to the sword; whether to defend themselves against the open attacks of a foreign enemy, or to check the insidious encroachments of domestic foes. Whenever a people...entrust the defence of their country to a regular, standing army, composed of mercenaries, the power of that country will remain under the direction of the most wealthy citizens...[Y]our liberties will be safe as long as you support a well regulated militia.¹⁰¹

Conclusion

In recent years it has been suggested that the

second amendment protects the "collective" right of states to maintain militias, but not the right of "the people" to keep and bear arms. If anyone entertained this notion in the period in which the Constitution and Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for no known surviving writing of the 1787-1791 period states that thesis. Instead, "the people" in the second amendment meant the same as it did in the first, fourth, ninth and tenth amendments, i.e., each and every free person. A select militia as the only privileged class entitled to keep and bear arms was considered as execrative to a free society as would be select spokesmen approved by government as the only class entitled to freedom of the press. Nor were those who adopted the Bill of Rights willing to clutter it with details such as non-political justifications for the right (e.g., self-protection and hunting) or a list of what everyone knew to be common arms, such as muskets, scatterguns, pistols and swords. In light of contemporary developments, perhaps the most striking insight made by those who originally opposed the attempt to summarize all the rights of a freeman in a bill of rights was that, no matter how it was worded, artful misconstruction would be employed to limit and destroy the very rights sought to be protected.

Footnotes:

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4 George Mason U.L. Rev. 1 (1981).

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1. Relevant state constitutional provisions at this time were: "That the people have a right to bear arms for the defence of themselves and the state..." Pa. Const. of 1776, Declaration of Rights, art. 13 (current version at Pa. Const. art. 1 Sect. 21); Vt. Const. of 1777, ch. I, Declaration of the Rights of the Inhabitants of the State of Vermont (current version at Vt. Const. ch. I, art. 16); "That the people have a right to bear arms, for the defence of the State..." N.C. Const. of 1776, A Declaration of Rights, cl. 17 (current version at N.C. Const. art. 1, Sect. 30); "The people have a right to keep and bear arms for the common defence." Mass. Const. of 1780, Pt. 1, A Declaration of Rights of the Inhabitants of the Commonwealth of Massachusetts, art. 17 (current version at Mass. Const. pt. 1, art. 17, Sect. 18). The following provision was adopted during the same period in which the Bill of Rights to the U.S. Constitution was being ratified; "That the right of the citizens to bear arms, in defence of themselves and the State, shall not be questioned." Pa. Const. of 1790, art. 9, Sect. 21 (current version of Pa. Const. art 1, Sect. 21).

2. 3 J. Adams, A Defence of the Constitutions of Government of the United States of America 471-72 (London, 1787-88). Newspaper editorialists of the time also alluded to Rome's disarming of conquered peoples.

The Massachusetts Centinel, Apr. 11, 1787, recalled "the old Roman Senator, who after his country subdued the commonwealth of Carthage, had made them deliver up...their arms...and rendered them unable ever to protect themselves..." 13 The Documentary History of the Ratification of the Constitution 79 (J. Kaminski & G. Saladino eds. 1981).

3. J.Adams, *supra* note 2, at 474.

4. *Id.* at 475.

5. Letter from Thomas Jefferson to Wm. S. Smith, (__, 1787), reprinted in T. Jefferson, *On Democracy* 20 (S. Padover ed. 1939). In his influential Letter of January 27, 1788, Luther Martin stated: "By the principles of the American revolution, arbitrary power may, and ought to, be resisted even by arms, if necessary." 1 J. Elliot, *Debates in the Several State Conventions* 382 (2d ed. Philadelphia, 1836). See also *New York Journal*, Aug. 14, 1788, at 2, col. 4 (the people will resist arbitrary power). A writer in the *Pennsylvania Gazette*, Apr. 23, 1788, criticized "the loyalists in the beginning of the late war, who objected to *associating, arming and fighting*, in defence of our liberties, because these measures were not constitutional. A free people should always be left...with every possible power to promote their own happiness." 2 The Documentary History of the Ratification of the Constitution (Mfm. Supp.) 2483 (M. Jensen ed. 1976).

6. The Federalist No. 28, at 180 (A. Hamilton) (Arlington House ed. n. d.).

7. The Federalist No. 29, at 184-85 (A. Hamilton) (Arlington House ed. n.d.).

8. The Federalist No. 46, at 294 (J. Madison) (Arlington House ed. n.d.).

9. *Id.* at 298.

10. *Id.* at 299.

11. *Id.* at 300. On arms regulation by the French monarchy to prevent democracy, see L. Kennett & J. Anderson, *The Gun in America* 5-16 (1975).

12. "The state declarations of rights are not repealed by this Constitution, and being in force, are sufficient," argued Roger Sherman in the federal convention, 5 J. Elliot, *Debates on the Adoption of the*

Federal Constitution 538 (Philadelphia, 1845). Hamilton averred in *The Federalist* No. 84 that a bill of rights "would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted." *The Federalist* No. 84, at 513 (A. Hamilton) (Arlington House ed. n.d.). Hamilton's fear appears vindicated in view of the current restrictive interpretation that the Bill of Rights recognizes no individual right to bear arms. See, e.g., L. Tribe, *American Constitutional Law* 226 n. 6 (1978).

13. Webster, *An Examination into the Leading Principles of the Federal Constitution* in *Pamphlets on the Constitution of the United States* 56 (P. Ford ed. 1888). See also *Id.* at 48, 51-52.

14. Coxe, *An American Citizen IV* in *The Documentary History of the Ratification of the Constitution*, *supra*, note 2, at 433.

15. *Id.* at 435, and in Coxe, *Examination of the Constitution*, in *Pamphlets on the Constitution of the United States*, *supra* note 13, at 151.

16. *Pennsylvania Gazette*, Feb. 20, 1788, *The Documentary History of the Ratification of the Constitution*, *supra* note 5, at 1778-80. See also *Foreign Spectator*, *Independent Gazetteer*, Sept. 21, 1787: "[E]ven the power of a veteran army could not subdue a patriotic militia ten times its number..." *Id.* at 384. *A Supplement to the Essay on Federal Sentiments*, *Independent Gazetteer*, Oct. 23, 1787: "[T]he whole personal influence of the Congress, and their parricide army could never prevail over a hundred thousand men armed and disciplined, owners of the country..." *Id.* at 801. Antifederalists agreed with this thesis. Thus, *the Freeman's Journal*, Feb. 27, 1788, stated that "it would require more troops than even the empress of Russia can command, to chain down the enlightened freemen..." *Id.* at 1829. And *Detector*, *Independent Gazetteer*, Feb. 11, 1788, gave the reason: "[T]he sons of freedom...may know the despots have not altogether monopolized these necessary articles [powder and lead]." *Id.* at 1695.

17. *Pennsylvania Gazette*, May 7, 1788, *The Documentary History of the Ratification of the*

Constitution, *supra* note 5, at 2579.

18. 5 J. Elliot, *supra* note 12, at 444.

19. The Antifederalist Papers 75 (M. Borden ed. 1965).

20. *Id.*.

21. *Id.* at 38.

22. *Id.* at 19.

23. Gerry, *Observations on the New Constitution* in Pamphlets on the Constitution of the United States, *supra* note 13, at 10.

24. *Id.* at 11.

25. Pennsylvania Herald, Oct. 17, 1787, The Documentary History of the Ratification of the Constitution *supra* note 5, at 196-97. See also Z, Freeman's Journal, Mar. 5, 1788: "[T]he people themselves freed America from foreign tyranny." *Id.* at 1925.

26. R. Lee, *Letters of a Federal Farmer* (1787-88), in Pamphlets on the Constitution of the United States, *supra* note 13, at 305-06.

27. R. Lede, Additional Letters from the Federal Farmer 53 (Philadelphia, 1788).

28. *Id.* at 169.

29. *Id.* at 170 (emphasis added).

30. A Slave, Philadelphia Independent Gazetteer, Oct. 6, 1787, The Documentary History of the Ratification of the Constitution, *supra* note 2, at 345. Aristocratis, in The Government of Nature Delineated 15-17 (1788) (hereinafter Aristocratis), feared that the active militia would "quell insurrections that may arise in any part of the empire on account of pretensions to support liberty, redress grievances, and the like." The Documentary History of the Ratification of the Constitution, *supra* note 5, at 2524. "The second class or inactive militia, comprehends all the rest of the peasants; viz., the farmers, mechanics, labourers, & c. which good policy will prompt government to disarm. It would be dangerous to trust such a rabble as this with arms in their hands," *Id.* at 2526.

31. Charleston State Gazette, Sept. 8, 1788, at __, col. __, See also *Id.*, Aug. 7, 1788, at 3, col. 1-2 (militia as citizenry); Letter from New York, Oct. 31, 1787, 3 The Documentary History of the Ratification of

the Constitution 390 (M. Jensen ed. 1978): "The militia [Art. I, Sect. 8, cl. 15] comprehends all the male inhabitants from sixteen to sixty years of age...The Constitution...puts the utmost degree of confidence in the people..."

32. *On Tyranny, Anarchy, and Free Governments*, New York Morning Post, Aug. 21, 1788, at 2, col. 2.

33. *A Friend to Equal Liberty*, Philadelphia Independent Gazetteer, Mar. 28, 1788, at __, col.__. The Federal Gazette, Mar. 12, 1789, at 2, col. 3 opined: "[I]f it is done, it is to be hoped the friends of *turtle* and *roast beef* will stand upon a clause in the bill of rights, to secure the perpetual enjoyment of those two excellent dishes."

34. Independent Gazetteer, Apr. 30, 1788, at __, col.__. See also Letter from Thomas B. Wait to George Thatcher (Aug. 15, 1788), in Thatcher Papers, Vol. II (available in Boston Public Library): "The same instrument that conveys the weapon, should refine the shield - should contain not only the powers of the rulers, but also the defence of the people."

"Brutus" wrote in the New York Journal, Nov. 1, 1787: "Some [natural rights] are of such a nature that they cannot be surrendered. Of this kind are the rights of...defending life..." The Documentary History of the Ratification of the Constitution, *supra* note 31, at 525.

35. As Expressed in the Boston Independent Chronicle, Oct. 25, 1787, in a "ship's news" satire on demands for a bill of rights:

[I]t was absolutely necessary to carry arms for fear of pirates, & c. and ...their arms were all stamped with peace, that they were never to be used by in case of an hostile attack, that it was in the law of nature for every man to defend himself, and unlawful for any man to deprive him of those weapons of self-defence.

The Documentary History of the Ratification of the Constitution, *supra* note 5, at 509.

36. The Documentary History of the Ratification of the Constitution, *supra* note 31, at 523.

36. The Documentary History of the Ratification of the Constitution, *supra* note 5, at 509.

37. Not only was the right to keep and bear

private arms universally acknowledged, but in Pennsylvania the right of individuals to keep public arms was asserted. "Jacob Trusty" queried the editor of the *Freeman's Journal*, Dec. 19, 1787, as follows:

I wish you would inform me, through the channel of your paper, of the true meaning of disarming the Militia in this State at this solemn period: The county officer chows us an order of Council for to deliver them for cleaning; but we in our county have upon second thought, resolved to clean them ourselves. Is this a trick for to push upon us the new plan of government whether we will or will not have it; no, Mr. Bailey, those gentlemen in your city who have planned it, are poor politicians, if they depend on our agreeing to give up our mush sticks.

The Documentary History of the Ratification of the Constitution, *supra* note 5, at 1361.

"A Militia Man" responded in the Pennsylvania Gazette, Dec. 26, 1787, that the Supreme Executive Council had merely directed the lieutenants "to collect all the public arms within their respective counties, have them repaired, and make return to Council...for payment." *Id.* at 1362. Jacob Trusty was then asserted to be mistaken "if he thinks the militia will be duped into a broil by any antifederalist..." *Id.* To this, "Trusty" responded in the Independent Gazetteer, Jan. 10, 1788, "that the militia of the country rather choose to repair and clean their own arms at this critical juncture, than to deliver them up to any one whatever." *Id.* at 1365. And "An Old Militia Officer of 1776" declared in the same paper on Jan. 18, 1788:

The orders, issued by Council, enjoining the delivery of the public arms at this juncture, when a standing army is openly avowed to be necessary, has occasioned no small degree apprehension...These orders...amount...to a temporary disarming of the people. When the arms will be redelivered, must depend upon the *discretion* of our rulers...But if ...these orders originate in that spirit of

domination...will it not be their indispensable duty, as men, as citizens, and as guardians of their own rights, immediately to arm themselves at their own expence? This expedient will convince the enemies of liberty, that the people (their own defenders in the last resort) are prepared for the worst...

Id. at 1369-70 See also *Aristocratis*, *supra* note 30, at 29-30, *id.* at 2538-39; *Independent Gazetteer*, Feb. 27, 1788, *Id.* at 1833; *Pennsylvania Herald*, feb. 5, 1788, *id.* at 1373; *Freeman's Journal*, Jan. 23, 1788, *id.* at 1371.

38. *The Documentary History of the Ratification of the Constitution*, *supra* note 5, at 336.

39. J. ELLIOT, *supra* note, 5, at 74.

40. *Id.* at 97.

41. *Id.* at 404.

42. 4 J. ELLIOT, *Debates in the Several State Conventions* 203 (2d ed. Philadelphia, 1836).

43. 3 J. ELLIOT, *Debates in the Several State Conventions* 45 (2d ed. Philadelphia, 1836).

44. *Id.* at 48.

45. *Id.* at 51-52.

46. *Id.* at 386.

47. *Id.* at 168-69.

48. *Id.* at 380.

49. *Id.* at 425.

50. See, e.g., *id.* at 413.

51. *Id.* at 646.

52. 2 B. Schwartz, *The Bill of Rights: A Documentary History* 681 (1971).

53. *Dissent of Minority*, *The Documentary History of the Ratification of the Constitution*, *supra* note 5, at 597-598, 623-24; E. Dumbauld, *The Bill of Rights and What it Means Today* 12 (1957). See also *id.* at viii-ix, 51-52. The amendments proposed by the Pennsylvania minority bear a direct relation to those ultimately adopted as the federal Bill of Rights." B. Schwartz, *supra* note 52, at 628. See also *id.* at 665. While the cited provision explicitly supports an individual right to have arms for more than militia purposes, the minority was very concerned about the specter of a select militia. "The militia of Pennsylvania may be marched to New England or Virginia to quell an

insurrection occasioned by the most galling oppression, and aided by the standing army, they will no doubt be successful in subduing their liberty and independency." The Documentary History of the Ratification of the Constitution, *supra* note 5, at 638.

54. B. Schwartz, *supra* note 52, at 761.

55. *Id.*

56. *Id.* at 758. "The right to bear arms, going back to the English Bill of Rights, received recognition in the Second Amendment to the Constitution...Counting this article, seven out of twelve of New Hampshire's proposals were ultimately accepted." E. Dumbauld, *supra* note 53, at 21 n.37.

57. A Foreign Spectator, *Remarks on the Amendments*, No. XI, Federal Gazette, Nov. 28, 1788, at __, col. __.

58. 3 J. ELLIOT, *supra* note 43, at 659. See also 3 G. Mason, Papers 1068-71 (1970).

59. E. Dumbauld, *supra* note 53, at 21 and 51-52; 2 B. Schwartz, *supra* note 52, at 765.

60. 1 J. Elliot, *supra* note 5, at 327-8.

61. *Id.* at 335.

62. 4 Annals of Cong. 434 (June 8, 1789).

65. Madison, Notes for Speech in Congress, June 8, 1789, 12 Madison Papers 193-94 (C. Hobson & R. Rutland eds. 1979). In a letter to Edmund Pendleton, Oct. 20, 1788, Madison referred to proposed amendments as "those further guards for private rights..." 4 Madison Papers 60 (C. Hobson & R. Rutland eds. 1979). In a Rough Draft of Proposed Bill of Rights that he would have presented had he not been defeated for election by Madison, James Monroe proposed "a declaration in favor of the equality of human rights;...of the right to keep and bear arms..." James Monroe Papers, N.Y. Public Library, Miscellaneous Papers.

66. Letter from Fisher Ames to Thomas Dwight (June 11, 1789), in 1 Works of Fisher Ames 52-53 (Philadelphia, 1854).

67. Letter from Fisher Ames to F.R. Minot (June 12, 1789), in *id.* at 53-54.

68. June 12, 1789, 3 Patrick Henry 391 (1951) (emphasis added). See also Letter from Joseph Jones to James Madison (June 24, 1789), in 12 Madison

Papers, *supra* note 65, at 258 (the Amendments are "calculated to secure the personal rights of the ..."); Letter from William L. Smithe to Edward Rutledge (Aug. 9, 1789), in 79 S.C. Hist. Mag. 14 (1968) (the amendments "will effectually secure private rights...")>

69. Madison's proposals had been published two days before in the same paper. Federal Gazette, June 16, 1789, at 2, Col. 2.

70. Letter from Tench Coxe to James Madison (June 18, 1789), in 12 Madison Papers, *supra* note 65, at 239-40.

71. Letter from James Madison to Tench Coxe (June 24, 1789), in *id.* at 257.

72. See, e.g., New York Packet, June 23, 1789, at 2, col. 1-2; Boston Massachusetts Centinel, July 4, 1789, at 1, col. 2.

Coxe's *Remarks on the Second Part of the Amendments*, which appeared in the Federal Gazette, June 30, 1789, explicated what is now the ninth amendment as follows:

It has been argued by many against a bill of rights, that the omission of some in making the detail would one day draw into question those that should not be particularized. It is therefore provided, that no inference of that kind shall be made, so as to diminish, much less to alienate an ancient tho' unnoticed right, nor shall either of the branches of the Federal Government argue from such omission any increase or extension of their powers.

Id. at 2, col. 1-2.

73. Federal Gazette, July 2, 1789, at 2, col. 1.

74. 1 Annals of Cong. 750 (1789). The committee on amendments made its report on July 28. *Id.* at 672.

75. *Id.* at 750

76. *Id.*

77. *Id.*

78. *Id.* at 751.

79. *Id.* at 766.

80. *Id.* at 767. Actually, the opposite may be inferred by the eventual deletion of this part of the amendment, the purpose of which was to guarantee the individual "right" to keep and bear arms rather than to

create a "duty" to do so. Arguably, this deletion was meant to preclude any constitutional power of government to compel any person to bear arms rather than to exempt only the religiously scrupulous.

81. *Id.* at 767.

82. *Political Maxims*, New York Daily Advertiser, Aug. 15, 1789, at 2, col. 1. See also Letter from Patrick Henry to Richard Lee (Aug. 28, 1789): "For Rights, without having power and might is but a shadow." Patrick Henry, *supra* note 68, at 398.

83. Philadelphia Independent Gazetteer, Aug. 18, 1789, at 3, col. 1.

84. *From the Boston Independent Chronicle*, Philadelphia Independent Gazetteer, Aug. 20, 1789, at 2, col. 2.

85. Centinel, Revived, No. xxix, Philadelphia Independent Gazetteer, Sept. 9, 1789, at 2, col. 2.

86. Senate Journal, Ms. by Sam A. Otis, Virginia State Library, Executive Communications, Box 13 (Sept. 4, 1789) at 1; (Sept. 8, 1789) at 7.

87. *Id.* (Sept. 8, 1789) at 7.

88. *Id.* (Sept. 9, 1789) at 1. Another alteration by the Senate may have also been significant. IN changing the House's version that a militia was "the best security" to the version that a militia was "necessary to the security" of a free state, the Senate may have sought to answer the objections like that made by Representative Gerry in the House: "A well regulated militia being the best security of a free State, admitted an idea that a standing army was a secondary one." 1 Annals of Cong. 751 (1789). It is noteworthy that Richard Henry Lee was a member of the Senate at that time.

89. 2 B. Schwartz, *supra* note 52, at 1164.

90. "The lower house sent up amendments which held out a safeguard to personal liberty in great many instances..." Letter from William Garyson to Patrick Henry (Sept. 29, 1789), Patrick Henry, *supra* note 68, at 406. "The whole of that Bill [of Rights] is a declaration of the right of the people at large or considered as individuals... [I]t established some rights of the individual as unalienable and which

consequently, no majority has a right to deprive them of." (emphasis added). Letter from Albert Gallatin to Alexander Addison (Oct. 7, 1789), A.G. Papers, at 2, Ms. in N.Y. Hist. Soc. "But there are some rights too essential to be delegated - too sacred to be infringed. These each individual reserves to himself; in the free enjoyment of these the whole society engages to protect him ... All these essential and sacred rights, it would be difficult, if not impossible, to recount, but some, in every social compact, it is proper to enumerate, as specimens of many others..." *An Idea of a Constitution*, Independent Gazetteer, Dec. 28, 1789, at 3 col. 3. See also *The Scheme of Amendments*, Independent Gazetteer, March 23, 1789, at 2 col. 1: "The project of muffling the press, which was publicly vindicated in this town [Boston], so far as to compel the writers against the government, to leave their names for publication, cannot be too warmly condemned." Registration of persons for exercise of basic freedoms was considered to be infringement.

91. Patrick Henry "is pleased with some of the proposed amendments; but still asks for the great desideratum, the destruction of direct taxation." Letter from Edmund Randolph to James Madison (Aut. 18, 1789), in 12 Madison Papers, *supra* note 65, at 345. Jefferson was dissatisfied with the bill of rights but did not object to the arms bearing provision. Letter from Thomas Jefferson to James Madison (Aug. 28, 1789), in 12 Madison Papers, *supra* note 65, at 363-64. The bill of rights was "short of some essentials, as Election interference & Standing Army & c..." Letter from Richard Henry Lee to Charles Lee (Aug. 28, 1789, in 2 Letters of Richard Henry Lee 499 (Ballagh ed. 1914). Most of those in the Virginia House who opposed the adoption of the amendments "are not dissatisfied with the amendments so far as they have gone" but wanted delay to prompt an amendment on direct taxes. Letter from Hardin Burnley to James Madison (Nov. 5, 1789), in 12 Madison Papers, *supra* note 65, at 460. In the Virginia Senate, there was extensive criticism of the proposed free speech guarantee and other amendments as too narrow, but no one questioned the right to bear arms provision. Objections to Articles, Va. Sen. J. 61-65

(Dec. 12, 1789). Virginia forestalled adoption of the bill of rights until the end of 1791. Nor did the Massachusetts General Court, which rejected the bill of rights, object to the arms bearing provision in its verbose Report of the Committee of the General Court on Further Amendments. See Report reprinted in Massachusetts and the First Ten Amendments 25-29 (D. Myers ed. 1936).

92. Remarks on the Amendments, Fayetteville Gazette, Oct. 12, 1789, at 2 col. 1.

93. The Gazette of the United States, Oct. 14, 1789, at 211, col. 2.

94. "A bill of rights for freemen appears to be a contradiction in terms...[I]n a free country, every right of human nature, which are as numerous as sands upon the sea shore, belong to the quiet, peaceable citizen." Federal Gazette, Jan. 5, 1790, at 2, col. 3. "The absurdity of attempting by a bill of rights to secure to freemen what they never parted with, must be self-evident. No enumeration of rights can secure to the people all their privileges..." Federal Gazette, Jan. 15, 1790, at 3, col. 3. This article ridiculed a bill of rights as analogous to conveying a house and lot but excepting out of the grant an enumeration of other houses and lots retained by the seller.

95. Speech of Jan. 7, 1790, Boston Independent Chronicle, Jan. 14, 1790, at 3, col. ___.

96. Providence Gazette & Country Journal, Jan. 30, 1790, at 1 col. ___.

97. Letter from Theodorick Bland to Patrick Henry (March 19, 1790). Patrick Henry, *supra* note 68, at 417-18.

98. "A well regulated militia is the best defence to a free people, a standing army in time of peace are not equal to a well regulated militia." Political Maxims, Independent Gazetteer, July 24, 1790, at 2, col. 1. "where a standing army is established, the inclinations of the people are but little regarded." Political Maxims, Independent Gazetteer, July 31, 1790, at 2, col. 2.

99. *E.G., Summary of the Principal Amendments Proposed to the Constitution*, post May 29, 1790 Ms. College

of Wm. & Mary, Tucker-Coleman coll., Box 39b notebooks,
Notebook VI, at 212-22.

100. Providence Gazette and Country Journal, June
5, 1790, at 23.

101. Independent Gazetteer, Jan. 29, 1791, at 2,
col.3.

The Right to Have Arms and Use Deadly Force Under the Second and Third Amendments

by David I. Caplan

SUMMARY

The constitutional right of the people to keep arms has deep roots in common law and constitutional history, and it remains of fundamental importance to this day. This right is explicitly guaranteed in the Second Amendment in the Bill of Rights and includes the keeping by private citizens of any hand-carried arms commonly used by private individuals and police for personal defense.

Because "A man's house is his castle and his defense," and because the Third Amendment in the Bill of Rights prohibits government from quartering soldiers in a person's house during times of peace without his consent, the constitutional right of the people to keep arms must guarantee at its core the legally unfettered ability of the householder to acquire speedily and to keep permanently and anonymously in his house such arms as are commonly used for home defense, not only as a means for resistance against violent burglars but also as a strong moral check and deterrent against illegal quartering of troops in his house.

A key purpose of the constitutional right of the people to keep arms was enunciated in **Presser v. Illinois** decided by the U.S. Supreme Court in 1886, to wit, "for maintaining the public security" -- that is, for citizen participation in preventing and suppressing violent felonies and capturing violent felons on the spot, a public purpose of great current importance and necessity, as at the common law.

STATEMENT

According to a 1977 Library of Congress, Congressional Research Service, legal analysis entitled "The Second Amendment: A Legal Analysis," the constitutional right of the individual citizen to keep arms has been "forcefully"¹ presented as follows:

The Second Amendment in the Federal Bill of Rights guarantees 'the right of the people to keep and bear arms.' This little understood and hence most under valued Article in our Bill of Rights was intended by its Framers to preserve our democratic-republican form of government and to prevent it from destroying the ballot box and from slipping into tyrannical totalitarianism. Especially when combined with the Ninth Amendment's bundle of rights which was retained by the people and with the Fifth Amendment's right to life, liberty, and property, the Second Amendment also plainly guarantees the private individual right to keep and carry Arms for the added purpose of self- preservation and defense of the individual...

The history and debates surrounding this 2d Amendment show that its Framers intended that a well regulated militia was only one of the purpose for the right of the people to keep and bear Arms. Viewed in another aspect, the 2d Amendment was adopted to obtain a militia which would be "well regulated" by the right of the people to keep and bear arms."²

The constitutional right of the people to keep and bear arms is further guaranteed today by the constitutions of thirty-seven States.³ This constitutional right inherently includes the right to use those arms for self-protection against attacks by burglars, robbers, arsonists, rapists, and other marauders-- according to a judicial decision decided in 1964⁴ in Louisiana, a State noted for pioneering the modern rules in America for the justifiable use of deadly force.⁵ This constitutional right to keep arms is further confirmed by the Third Amendment in the Federal Bill of Rights (prohibiting quartering of soldiers in any house during times of peace without the consent of the owner) and the Fourth Amendment (prohibiting unreasonable searches and seizures), especially because of the close historical association -- well-known to the Framers of the Bill of Rights -- between governmental disarming of the populace and quartering of troops, as well as mass searches and seizures.⁶

"A man's house is his castle and his defense, and where he has a peculiar right to stay..." declared an English court⁷ in 1506, in the context of the right to protect oneself from bodily harm. As explained by Lord Coke:⁸

And yet in some cases a man may not only use force and arms, but assemble company also. As any man may assemble his friends and neighbors to keep his house against those that come to rob him, or kill him, or to offer him violence in it,...for a man's house is his castle, &c *domus sua cuique est tutissimum refugium* [a house is for everyone his safest refuge]; for where shall a man be safe, if it be not in his house? And in this sense it is truly said

Armaque in armatos sumere jura sinunt.

[The laws permit taking up arms against armed persons.]

The importance of the foregoing quote, from Coke's **Institutes of the Laws of England**, resides in the fact that of all the books on either law or politics in colonial libraries "the most common was Coke's *Institutes*"⁹ and that the U.S. Supreme Court has recently expressed the opinion that Lord Coke was "widely recognized by the American colonist as the greatest authority of his time on the laws of England."¹⁰ Thus Coke's **Institutes** formed the basis upon which the Framers of the Bill of rights drafted "in a compact draft,...express in terms of the common law,"¹¹ such Articles in the Bill of Rights as the right to keep and bear arms, and the right to be free in one's own house from quartering of soldiers during times of peace without his consent even **when all else fails**.

In **Stanley v. Georgia**,¹² the U.S. Supreme Court in 1969 held unconstitutional a State statute prohibiting the possession of obscene materials even in one's own home. The Court extended constitutional protection to the mere possession of such pornographic materials, however unprotected such possession might be under the First Amendment, upon the sole legal basis of "privacy of the home,

... a reaffirmation that 'a man's house is his castle.'" ¹³ Thus even if it were to be assumed that handguns are the hard-core pornography of the Second Amendment, or that handguns are not constitutionally protected "arms" within any guarantee of the Constitution or common law, nevertheless the "mere possession...in the privacy of a person's own house" ¹⁴ of handguns would still be constitutionally protected, both from State and from Federal regulation, because "a man's house is his castle and his defense."

Of particular importance thus is the Second and Third Amendment protection of the right to keep arms in the house permanently and anonymously--that is, arms immune from registration or licensing; and the right to acquire those arms quickly and with no legal impediments or burdens is thus also guaranteed. Moreover, the procedural and substantive due process concern for the individual's "life, liberty, [and] property" contained in the Fifth and Fourteenth Amendments, as well as the right to privacy and other non-enumerated personal rights protected by the Ninth Amendment, ¹⁵ further confirm and guarantee the individual constitutional right to keep and use arms for "self preservation and defence." ¹⁶

The constitutional test of "balancing of interests" ¹⁷ cannot be applied in cases of core constitutional rights. Thus, for example, the U.S. Supreme Court in a 1979 case ¹⁸ refused to consider any balancing of conflicting interests when dealing with "the constitutional privilege against compulsory self-incrimination in its most pristine form." ¹⁹ Similarly, by the same token, there can be no balancing - of-interest test when dealing with the "unqualified" ²⁰ right to **keep** arms as opposed to the qualified right to **bear** arms. The keeping of handguns in the home for self preservation and defense thus lies at the core of the constitutional right to keep arms for the purpose of defending one's own house--one's castle--and may thus not be cut down by any balancing test if we are going to be at all faithful to fundamental constitutional principles.

Courts have dealt with the utility of handguns in another context. In order for an invention to be patentable, it must have utility. ²¹ In a 1969 case, ²² the United States Court of Customs and Patent Appeals put its hearty stamp of approval on its updated quotation from a 1903 decision ²³ of the U.S. Court of Appeals, 7th Circuit, in turn quoting from the 1880 textbook **Walker on Patents**:

An important question, relevant to utility in this aspect, may hereafter arise and call for judicial decision. It is perhaps true, for example, that the invention of Colt's revolver was injurious to the good order of society. That instrument of death may have been injurious to morals, in tending to tempt and to promote the gratification of private revenge. It may have been injurious to health, in that it is very liable to accidental discharge, and thereby to cause wounds, and even homicide. It may also have been injurious to good order, especially in the newer parts of the country, because it facilitates and increases private warfare among frontiersmen. On the other hand, the revolver, by furnishing a ready means of self-defense, may sometimes have promoted morals and health and good order. By what test, therefore is utility to be determined in such cases? Is it to be done by balancing the good functions with the evil functions? Or is everything useful within the meaning of the law, if it is used (or is

designed and adapted to be used) to accomplish a bad one? Or is utility negated by the mere fact that the thing in question is sometimes injurious to morals, or to health, or to good order? The third hypotheses cannot stand, because if it could, it would be fatal to patents for steam engines, dynamos, electric railroads, and indeed many of the noblest inventions of the nineteenth century. [And what of such things as automobiles, airplanes, tires, power tools, explosives, lawn mowers, and drugs in the twentieth century?] The first hypothesis cannot stand, because if it could, it would make the validity of patents to depend on a question of fact to which it would often be impossible to give a reliable answer. **The second hypothesis is the only one which is consistent with the reason of the case, and with the practical construction which the courts have given to the statutory requirements of utility.**²⁴

Just as the revolver's fundamental socially redeeming importance for self-defense thus renders its invention patentable from the standpoint of utility, likewise this same self-defense feature renders the possession of a revolver by the law-abiding citizen worthy of constitutional protection under the Second Amendment of the Bill of Rights.

The constitutional right to keep and use arms raises two fundamental threshold issues as to what arms, and what uses, are constitutionally protected. As with other provisions²⁵ of the Bill of Rights, the common law furnishes the proper standards and criteria for the right to keep and use arms. In short, the arms protected under the common law, and hence under the Constitution, in the hands of the citizenry are all those arms which are "hand-carried weapons [i.e., which can be borne by an individual] commonly used by individuals [and police] for personal defense."²⁶ Thus, firearms such as pistols, revolvers, rifles, and shotguns are all clearly within the ambit of constitutional protection, and none can logically be excluded. As to constitutionally protected uses, these include the common-law justifiable (and not merely excusable)²⁷ uses of deadly force against violent felons encountered in the act of felony committed by "violence [and] surprise"²⁸ who "would not surrender peaceably, but stood on their defense, or fled."²⁹ In all such cases of felonious attacks, the life of the victim is **presumed** to be in danger under the common law;³⁰ and hence in all those cases the victim or bystander was justified under common law to use deadly force to prevent or resist the felony and to capture the felon, as an act worthy of "commendation rather than blame."³¹ Accordingly, the justifiable uses of deadly force with firearms commonly used for the purpose, under common law rules of justification, lies at the core of the constitutional right to keep and bear arms; their use to defend the home by preventing or suppressing burglary or arson was "one of the major privileges of the common law."³²

1. **The Second Amendment: A Legal Analysis**, Congressional Research Service, Library of Congress (1977) (77-84-A, 639/90, UC 460 B), pp. 43-44.

2 "Point Blank", Vol. VI, No. 7, July 1976, p.2, as quoted in note 1.

3 D.I. Caplan, **The Right of the Individual to Bear Arms: A Recent Judicial Trend**, Detroit College of Law Review (Fall 1982), 790n.8.

4 **McKellar v. Mason**, 159 So. 2d 700, 702 (4th La. Cir., 1964) ("The Constitutions of the United States and Louisiana give us the right to keep and bear arms. It follow logically, that to keep and bear arms gives us the right to use the arms for the intended purpose for which they were manufactured."). The U.S. Supreme Court in **Presser v. Illinois**, 116 U.S. 252, 265 (1886) declared that the constitutional right of the people to keep and bear arms was so fundamental that even putting the Second Amendment "out of view," the States cannot infringe the right of the people to keep and bear arms for otherwise the people could be deprived of "their rightful resource for maintaining the public security." Id.

5 **See**, Professor H. Wechsler, Chief Reporter of Model Penal Code, statement in **35th Annual Meeting, The American Law Institute, Proceedings** (1958), p. 285.

6 **See**, Professor H. Wechsler, Chief Reporter of Model Penal Code, statement in **35th Annual Meeting, The American Law Institute, Proceedings** (1958), p. 285.

7 Anonymous, 21 Henry VII, 39 pl. 50 (K.B., 1506), transl., J.H. Beale, Jr., **A selection of Cases and Other Authorities Upon Criminal Law** (2nd ed., 1907), p. 569.

8 E.Coke, **The Third Part of the Institutes of the Laws of England**, The Mary Ingraham Bunting Institute of Radcliffe College, Bunting Institute Working Paper (1980), p. 15. **See also, State v. Kessler**, 289 Oregon 359, 363-363, 614 P. 2d 94, 96 (19980); and **see also**, D.I. Caplan **Restoring the Balance: The Second Amendment Revisited**, 5 Fordham Urban Law Journal 31, 35-36 (1976).

9 **Payton v. New York**, 445 U.S. 573, 594 n. 36 (1980).

10 Id., 445 U.S. at 594.

11 **Ex parte Grossman**, 267 U.S. 87, 109 (1925).

12 394 U.S. 557 (1969).

13 **Paris Adult Theatre v. Slayton**, 413 U.S. 49, 66 (1973).

14 **Stanley v. Georgia**, *supra* note 12, 394 U.S. at 564.

15 **See, Griswold v. Connecticut**, 381 U.S. 479, 486 (1965) ("a right of privacy older than the Bill of Rights--older than our political parties, older than our school system.") (The same can be said of the right of self-defense against violent burglars. See, 4 W. Blackstone, **Commentaries on the Laws of England** (1769), p. 180 ("...[S]uch homicide, as is committed for the prevention of any forcible and atrocious crime, is justifiable by the law of nature; and also by the law of England, as it stood so early as the time of Bracton [died 1268], and as it is since declared by statute 24 Hen. VIII. c. 5 [1532]...So the Jewish law, which punishes no theft with death; makes homicide only justifiable, in case of **nocturnal** housebreaking...At Athens, if any theft was committed by night, at was lawful to kill the criminal, if taken in the fact".).) And **see also**, D.I. Caplan, **Restoring the Balance: The Second Amendment Revisited** 5 Fordham Urban Law Journal (1976), at pp. 49-50.

16 1 W. Blackstone, **Commentaries** (1765), p. 140. Facsimile ed., 1979.

17 **Jersey v. Portash**, 440 U.S. 450, 459 (1979).

18 *Id.*

19 *Id.*

20 **Aymette v. State**, 21 Tenn. 119, 124, 2 Humph. 154, 159 (1840), a case repeatedly cited with approval in **United States v. Miller**, 307 U.S. 174, 178, 182 n. 3 (1939).

21 35 U.S. Code sect.102.

22 **re Anthony**, 414 F. 2d 1383 (CCPA, 1969).

23 **Fuller v. Berger**, 120 Fed. 274 (7th Cir., 1903).

24 **In re Anthony**, *supra* note 22, 414 F. 2d n. 12.

25 For example, in **Payton v. New York**, 445 U.S. 573, 591 (1980), regarding the standards for the Fourth Amendment's "reasonableness" of searches and seizures (including body seizures or arrests), the U.S. Supreme Court declared: "An examination of the common-law understanding of an officer's authority to arrest sheds light on the obviously relevant, if not entirely dispositive, consideration of what the Framers of the Amendment thought to be reasonable." For other examples, **see** D.I. Caplan, **Restoring the Balance; The Second Amendment Revisited**, 5 Fordham Urban Law Journal (1976). p. 33 and n. 16. **See also, supra** note 11 and accompanying text.

26 **State v. Kessler**, 289 Oregon Reports p. 359, at p. 371, 614 Pacific Reporter, 2d Series, p. 94, at

p. 100 (1980). Compare the English common-law standard of "wearing common weapons." 1 W. Hawkins, **Pleas of Crown** (5th ed., 1771), p. 136.

27 For the distinction between justifiable and excusable homicide, **see**, R.M. Perkins, **Criminal Law** (2nd ed., 1969), pp. 1001 - 1002. Basically, justifiable homicides arose in the killing of violent burglars, robbers, arsonists, and rapists caught in the act or in immediate flight therefrom; excusable homicides arose in sudden brawls, heat of passion or accidents. He who committed a justifiable homicide was fully acquitted and discharged; he who committed a merely excusable homicide required a pardon from the crown in order to be released from jail and at various times in English history, forfeited his worldly goods even if pardoned.

28 **Beard v. United States**, 158 U.S. 550, 562, 563 (1895). quoting from East's **Pleas of the Crown**, Foster's **Crown Cases**, and Wharton on **Criminal Law**.

29 **Rex v. Compton**, 22 Liber Assisarum (Book of Assizes) placitum 55 (1347), transl. in J.H. Beale, Jr., **Retreat from a Murderous Assault**, 16 Harvard Law Review (1903), p. 567, at p. 569. This **Compton's Case** was cited as controlling authority in 3 E. Coke, **Institutes** (5th ed., 1671), p. 221.

30 **United States v. Gilliam**, 25 Fed. Cas. 1319, 1320 (Case No. 15,205a) (D.C., 1882); **People v. Ceballos**, 12 Cal. 3d 470, 478, 526 P. 2d 241, 254 (1974) ("...from their atrocity and violence, human life either is, or is presumed to be, in peril.") (Emphasis added)

31. 4 W. Blackstone, **Commentaries on the Laws of England** (1769), p. 182 (Facsimile of the First Edition, 1979.)

32 R.M. Perkins, **Criminal Law** (2nd ed., 1969), p.992 p. 1004.